

No. 333

Consolidated with Nos. 117, 118, 119, 332 and 334

---

**In the Supreme Court of the United States :**

OCTOBER TERM, 1955

UNION PACIFIC RAILROAD COMPANY;  
CHICAGO AND NORTH WESTERN RAILWAY COMPANY;  
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY  
COMPANY;  
NORTHERN PACIFIC RAILWAY COMPANY;  
GREAT NORTHERN RAILWAY COMPANY;  
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY  
COMPANY;  
WABASH RAILROAD COMPANY,

Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD  
COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO

BRIEF FOR ABOVE NAMED APPELLANTS

ELMER B. COLLINS,  
Counsel of Record,  
1416 Dodge Street,  
Omaha, Nebraska.

F. O. STEADRY,  
L. E. TORINUS,  
WARREN H. PLOEGER,  
ROLAND J. LEHMAN,  
EUGENE S. DAVIS,  
JAMES C. WILSON,

Attorneys for Above Named  
Appellants.

W. R. ROUSE,  
LOWELL HASTINGS,  
EDWIN C. MATTHIAS,  
M. L. COUNTRYMAN, JR.,  
J. C. GIBSON,  
Of Counsel.

---

# INDEX

	Page
Opinions Below .....	1
Jurisdiction .....	1
Statutes Involved .....	2
Questions Presented .....	3
Statement .....	9
The Commission's Findings and Conclusions .....	13
Opinion of the District Court .....	18
Summary of Argument .....	20
Argument .....	27

## I.

The District Court Erred in Failing to Dismiss the Complaint on the Ground That, as the Commission's Failure to Compel Through Routes and Joint Rates for Commodities Not Named in the Order Is Neither an "Order" Nor a Part of the Order Issued, There Is no Jurisdictional Basis for Court Review .....	27
--	----

## II.

The District Court Erred in Denying the Motion to Dismiss on the Ground That the Rio Grande Has no Legal Right or Standing to Maintain This Suit .....	35
--	----

## III.

The Court Erred in Holding That the Commission's Finding That "there are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned" Is Not Supported by Substantial Evidence and Is Erroneous as a Matter of Law, and the Court Further Erred in Its Own Holding That the Evidence Establishes the Existence of Such Through Routes .....	53
--	----

The Fallaciousness of the Lower Court's Decision That Through Routes are Already in Existence via the Rio Grande for the Traffic Concerned Is Sharply Illustrated and Emphasized by the Situation With Respect to the Great Northern, Northern Pacific and Milwaukee Railroads .....	83
--	----

## INDEX—Continued

Page

### IV.

Upon Its Holding That the Commission "erred as a matter of law" in Finding That There Are at Present no Through Routes Via the Rio Grande as Claimed by It, and That This Finding "obviously prejudiced the entire proceeding", the District Court Erred in Concluding That the Commission's Order Should Be Annulled and Set Aside Only "in so far as it denied relief to the Rio Grande", and in Failing to Hold That the Order Requiring Through Routes and Joint Rates for the Articles Therein Named, as Well as the Commission's Failure to Require Joint Rates for All Commodities Should Be Annulled and Set Aside.....

87

### V.

The District Court Erred in Commingling and Confusing the Provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act and in Ignoring the Fact That the Commission Had Already Heard and Adjudicated the Rio Grande's Case....

93

### VI.

The District Court Exceeded Its Power by Usurping Administrative Authority to Make Findings of Fact Favorable to the Rio Grande and Thereupon "remanding" That Part of the Case "with appropriate instructions" to the Commission "for further proceedings in conformity with this opinion" .....

98

Conclusion ..... 103

Proof of Service..... 104

#### Cases Cited:

Adrian Grain Co. v. Ann Arbor R. Co., 276 I. C. C. 331..... 70

Alabama Power Co. v. Ickes, 302 U. S. 464..... 39, 41, 50

Alton R. Co. v. United States, 315 U. S. 15..... 36, 49

American Express Co. v. Caldwell, 244 U. S. 617..... 29

Ann Arbor R. Co. v. United States, 281 U. S. 658..... 90

Assigned Car Cases, 274 U. S. 564..... 47

Atchison & Topeka Ry. v. Harold, 241 U. S. 371..... 76

Atchison, etc. Ry. Co. v. U. S., 284 U. S. 248..... 91

A. T. & S. F. Ry. v. United States, 279 U. S. 768..... 36, 66

## INDEX—Continued

	Page
Atchison, Topeka and Santa Fe Ry. Co. v. United States, 130	
F. Supp. 76, afd. 76 S. Ct. 152.....	49, 50
Atlantic Coast Line R. Co. v. U. S., 284 U. S. 288.....	66
Baltimore & Ohio R. Co. v. Brady, 288 U. S. 448.....	21, 30
W. H. Bintz Co. v. Abilene & S. Ry. Co., 216 I. C. C. 481....	9
Brady v. Interstate Commerce Commission, 43 F. 2d 847; afd. 283 U. S. 804.....	31
Carolina Freight Carriers Corp. v. United States, 38 F. Supp. 549 .....	92
Chicago Junction Case, 264 U. S. 258.....	34, 36, 44, 49
Claiborne-Annapolis Ferry v. U. S., 285 U. S. 382.....	36
Columbia System v. U. S., 316 U. S. 407.....	48
Commercial Club, Salt Lake City v. A., T. & S. F. Ry. Co., 19 I. C. C. 218.....	9, 10
Communications Comm'n v. WOKO, 329 U. S. 223.....	26, 102
Denver & Rio Grande Investigation, 113 I. C. C. 75.....	9
Ford Motor Co. v. Labor Board, 305 U. S. 364.....	26, 101
Georgia Comm. v. United States, 283 U. S. 765.....	29
Edward Hines Trustees v. U. S., 263 U. S. 143.....	22, 36, 44
Humphrey's Executor v. U. S., 295 U. S. 602.....	102
Illinois Cent. & c. R. R. v. Inter. Com. Comm., 206 U. S. 441..	89
Interstate Comm. Comm. v. Ill. Cent. R. R., 215 U. S. 452....	47, 99
Kansas City Sc. Ry. v. Albers Comm. Co., 223 U. S. 573....	66
Livestock-Western District Rates, 176 I. C. C. 1; 190 I.-C. C. 175 .....	9
Lumber Rates, Oregon and Washington to Eastern Points, 29 I. C. C. 609; 31 I. C. C. 191.....	63
Manufacturers Ry. Co. v. United States, 246 U. S. 457...26, 34, 47, 101	
E. Brooke Matlack, Inc. v. United States, 119 F. Supp. 617.....	92
Mitchell v. United States, 313 U. S. 80.....	32, 33, 45
Mitchell Coal Co. v. Penna. R. R. Co., 230 U. S. 247.....	30
Moffat Tunnel League v. U. S., 289 U. S. 113.....	36
Montana-Dakota Co. v. Pub. Serv. Co., 341 U. S. 246.....	47

# **INDEX—Continued**

	Page
N. Y. Central R. Co. v. The Talisman, 238 U. S. 239.....	75
Norfolk & W. Ry. Co. v. Dixie Tobacco Co., 228 U. S. 593....	76
The Ogden Gateway Case, 35 I. C. C. 131.....	64
Pittsburgh & W. Va. Ry. v. U. S., 281 U. S. 479.....	22, 36, 44
Radio Comm'n v. Nelson Bros. Co., 289 U. S. 266.....	102
Reconstruction Finance Corp. v. Denver & R. G. W. R. Co., 328 U. S. 495.....	9
Rochester Tel. Corp. v. U. S., 307 U. S. 125.....	32, 33, 48
St. Louis S. W. Ry. Co. v. United States, 245 U. S. 136....	76
Securities Comm'n v. Chenery Corp., 332 U. S. 194.....	21, 31
Sec'y of Agriculture v. United States, 347 U. S. 645.....	101
Shannahan v. United States, 303 U. S. 596.....	33
Siegel Co. v. Trade Comm'n, 327 U. S. 608.....	102
Singer & Sons v. Union Pacific R. Co., 311 U. S. 295.....	50
Southern Ry. Co. v. Reid, 222 U. S. 424.....	76
Sprunt & Son v. United States, 281 U. S. 249.....	22, 36, 44
Standard Oil Co. v. United States, 283 U. S. 235.....	21, 31, 35, 101
Steinmetz v. Atchison, T. & S. F. Ry. Co., 293 I. C. C. 202...	66
Swayne & Hoyt, Ltd. v. U. S., 300 U. S. 297.....	47
Tennessee Power Co. v. T. V. A., 306 U. S. 118.....	39, 50
Texas and Pac. Ry. v. Abilene Cotton Oil Co., 204 U. S. 426..	47
Thompson v. United States, 343 U. S. 549....	13, 23, 24, 26, 55, 61, 65, 66, 68, 69, 71, 72, 75, 76, 77, 79, 80, 81, 82, 96
United States v. Atlanta, B. & C. R. Co., 282 U. S. 522....	20, 27, 29, 30, 33
U. S. v. Carolina Carriers Corp., 315 U. S. 475.....	92
U. S. v. Great Northern R. Co., 343 U. S. 562.....	32, 98
United States v. Merchants & C. Ass'n, 242 U. S. 178.....	43
United States v. Mo. Pac. R. Co., 278 U. S. 269.....	37
United States v. U. P. R. R. Co., I. C. C. 518.....	64

## INDEX—Continued

	Page
Utah Coal Operators Assn. v. Atchison, T. & S. F. Ry. Co., 218 I. C. C. 663.....	9
Virginian Ry. v. United States, 272 U. S. 658.....	80, 81
Western Pacific v. South. Pac. Co., 284 U. S. 47.....	35, 49
Youngstown Co. v. U. S., 295 U. S. 476.....	46, 47

### Statutes Cited:

Administrative Procedure Act, 5 U. S. C. § 1009.....	
Section 1009(a) .....	50
Urgent Deficiencies Act, 38 Stat. L. 219 (28 U. S. C. §§ 1336, 1398).....	27
Interstate Commerce Act, as amended, 49 U. S. C. §§1, et seq.:	
National Transportation Policy.....	2
Section 1(4) .....	2, 8, 11, 19, 42, 93, 95, 97, 98
Section 1(15) .....	73
Section 3 .....	11, 46
Section 3(1) .....	17
Section 3(4) .....	2, 8, 17, 19, 42, 93, 95, 97, 98
Section 15(1) .....	2, 8, 11, 19, 42, 93, 95, 97, 98
Section 15(3) .....	2, 4, 8, 11, 19, 42, 70, 73, 81, 93, 95, 96, 97, 98
Section 15(4) .....	2, 4, 8, 12, 24, 37, 53, 54, 67, 70, 73, 80, 88, 96, 97, 98
Section 15(4)(b) .....	4
Section 15(8) .....	2, 69, 70
Section 20(11) .....	2, 75
United States Code, Title 28:	
Section 1253 .....	2
Section 1336 .....	2, 27, 100
Section 1398 .....	2, 27
Section 2101(b) .....	2
Section 2284 .....	3
Sections 2321-2325 .....	2

# INDEX—Continued

	Page
Miscellaneous:	
Attorney General's Manual on the Administrative Procedure Act, 1947 .....	51
"Through Routes"—transcript hearings before Interstate & Foreign Commerce Committee, House of Rep., on Sen. Bill 1261, Dec. 1937 and April 1938, .....	54
Appendix A—Map of Union Pacific Railroad Co., etc.	
Appendix D—Pertinent provisions of the Interstate Commerce Act, as amended, 49 U. S. C. §§ 1, et seq.	

No. 333

Consolidated with Nos. 117, 118, 119, 332 and 334

## **In the Supreme Court of the United States**

OCTOBER TERM, 1955

UNION PACIFIC RAILROAD COMPANY;  
CHICAGO AND NORTH WESTERN RAILWAY COMPANY;  
CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA RAILWAY  
COMPANY;  
NORTHERN PACIFIC RAILWAY COMPANY;  
GREAT NORTHERN RAILWAY COMPANY;  
THE ATCHISON, TOPEKA AND SANTA FE RAILWAY  
COMPANY;  
WABASH RAILROAD COMPANY,

Appellants,

v.

THE DENVER AND RIO GRANDE WESTERN RAILROAD  
COMPANY.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLORADO.

BRIEF FOR ABOVE NAMED APPELLANTS

### **OPINIONS BELOW**

The opinion of the United States District Court for the District of Colorado is reported in 131 F. Supp. 372 (R. 279). The report of the Interstate Commerce Commission is found in 287 I. C. C. 61 (R. 57).

### **JURISDICTION**

This action was brought in the United States District Court for the District of Colorado by The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande") against the United States of

America and the Interstate Commerce Commission, pursuant to 28 U. S. C. 1336, 1398, 2284 and 2321-2325, to enjoin, annul, suspend and set aside "in part" an alleged "order" of January 12, 1953, by the Commission in a proceeding entitled "Docket No. 30297, Denver & Rio Grande Western Railroad Co. v. Union Pacific Railroad Co. et al." These appellants intervened as defendants in the district court.

The final judgment and decree of the district court, dated February 1, 1955, was entered February 14, 1955. On April 22, 1955, the district court entered an order overruling and denying a motion of these appellants and others for new trial or reargument and reconsideration (R. 361-362).

Notice of appeal was filed by these appellants in the United States District Court for the District of Colorado on June 20, 1955 (R. 365).

The jurisdiction of this Court to review the judgment by direct appeal is conferred by 28 U. S. C. 1253 and 2101(b). Probable jurisdiction was noted by this Court on October 24, 1955.

### **STATUTES INVOLVED**

This appeal involves the following provisions of the Interstate Commerce Act, Part I, 49 U. S. C. 1, *et seq.*, which are set out in Appendix B hereto:

National Transportation Policy (preceding Section 1), and Sections 1(4), 3(4), 15(1), 15(3), 15(4), 15(8) and 20(11).

## QUESTIONS PRESENTED

The Commission's alleged "order" results from a complaint filed by appellee, The Denver and Rio Grande Western Railroad Company (hereinafter called "Rio Grande"), a chronically bankrupt and "financial needs" short line railroad, for the admitted purpose of improving its financial condition by diverting for a "bridge" haul over its line about 172,000 carloads annually of traffic originated and terminated on through routes of the Union Pacific Railroad Company and other railroads and hauled under joint rates maintained over those routes through Wyoming and Nebraska for 75 years, between points in the northwest area, embracing the States of Oregon, Washington, Montana, Idaho and Utah north of Ogden, and points in the eastern and southern parts of the United States.<sup>1</sup>

The joint rates do not apply via the Rio Grande and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved over that line.

The only order issued by the Commission (R. 20-22) requires that these appellants and over 200 other railroads establish through routes and joint rates demanded by the Rio Grande "the same" as the joint rates maintained by them on the several commodities named in the order, which comprise about 57,000 carloads, or one-third of the traffic annually that the Rio Grande seeks to divert over its line, short-hauling the Union Pacific and other

---

<sup>1</sup> The lines and termini of the Union Pacific and the Rio Grande (main lines) are indicated on the map attached hereto as Appendix A.

lines at least 92<sup>1</sup>/<sub>2</sub> miles on traffic from which the Union Pacific alone earns about \$11,000,000.00 annually.<sup>2</sup>

But the Commission did not order through routes and joint rates on about two-thirds of the traffic, and it is the Commission's *failure to order* through routes and joint rates on the remaining two-thirds of the traffic which the Rio Grande assailed and the lower court annulled and enjoined in this case. Such *failure* is not embraced in the order issued or in any order of the Commission.

The Rio Grande contended before the Commission that through routes at the combination or sum of local rates already existed via its line for the traffic it seeks and demanded that the lower joint rates maintained over existing Union Pacific routes be made applicable via its line and that its line be included at equal joint rates in the many hundreds of thousands of existing through routes between some 39,000 railroad stations in the east and south and some 2,900 stations in the northwest area.

The Commission held that the through routes claimed by the Rio Grande did not exist for the involved traffic within the meaning of Section 15(3) and (4) of the Act, and that if through routes and joint rates were ordered via the Rio Grande they would have to be grounded on findings required by Section 15(4)(b), which permits the Commission to short haul existing routes only if it finds that "the through route *proposed* to be established is needed in order to provide adequate, and more efficient or more economic, transportation". The Commission found that through routes via the Rio Grande were "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" for

2. The validity of the order issued is now before this Court in Nos. 117, 118 and 119, appeals from the final decree of the United States District Court for the District of Nebraska.

certain commodities which comprise about one-third of the total volume of the traffic the Rio Grande seeks to divert to its line. The Commission concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained."

The order does not in terms deny, dismiss or withhold anything, nor does it make any reference to the remaining two-thirds of the traffic the Rio Grande seeks to divert to its line. For the purpose of having the Commission order through routes and joint rates via its line on the remaining two-thirds of the traffic, the Rio Grande brought this suit to enjoin and annul the Commission's *failure* to include that two-thirds of the traffic in its order.

The district court overruled a motion to dismiss the case on the ground that, as the Rio Grande admittedly has no legal or other right to improve its financial position by diverting traffic from other railroads, it has no standing to maintain the suit. The court further held that through routes via the Rio Grande are already in existence for the involved traffic, that the Commission erred as a matter of law and upon the evidence in finding that the claimed routes are not in existence, and that this finding by the Commission "obviously prejudiced the entire proceeding". The court enjoined and annulled the alleged "order" insofar as it "denied and withheld" relief from the Rio Grande, and "remanded" the case to the Commission for further proceedings in conformity with the court's opinion "insofar as the aforesaid order of the Interstate Commerce Commission denied and withheld relief" to the Rio Grande.

The following questions are presented by this appeal:

(1) Whether the court erred in refusing to dismiss the Rio Grande's complaint and intervening complaints on the ground that, as the Commission's failure to order through routes and joint rates on *all* instead of only a part of the traffic is not an "order" or a part of any order issued by the Commission, there is no jurisdictional basis for judicial review.

(2) Whether the district court erred in holding that plaintiff, the Rio Grande, admittedly lacking any legal or other right to traffic it seeks to divert to its line from other carriers, has standing to maintain this suit, for the purpose of obtaining a "pecuniary profit" from that part of the traffic for which the Commission failed to order through routes and joint rates via the Rio Grande.

(3) Whether the court erred in making its own administrative finding that, "under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines", contrary to the Commission's finding that the evidence did not prove discrimination, and erred further in relying upon its own administrative finding to sustain the standing of the Rio Grande to maintain this suit.

(4) Whether the court erred in holding, in effect, that the Commission's finding that the evidence failed to prove discrimination against the Rio Grande and its failure to order through routes and joint rates on *all* instead of a part of the traffic, amounts to the denial of a right given the Rio Grande by the [Interstate Commerce] Act adversely affecting its traffic and revenues, causing it to suffer pecuniary injury, and giving it "a right to judicial review of the order".

(5) Whether, in resting its decision that the Rio Grande has standing to maintain this suit upon several hypothetical or "if" propositions, the court erred in ignoring or giving no effect to the fact that, after full hearings and thorough consideration of the evidence, the Commission found that, except to the extent indicated in its findings, the evidence failed to prove discrimination against the Rio Grande or that through routes and joint rates by the Rio Grande are necessary in the public interest to provide adequate and more economic transportation, and concluded that, except as indicated in its findings, "the allegations made in the complaint are not sustained".

(6) Whether the court erred in failing to hold that neither the Rio Grande nor intervening plaintiffs had standing to maintain this suit.

(7) Whether the court erred in holding that the Commission's finding that "there are at present no through routes, as that term is used in the Act", over the Rio Grande via Ogden or Salt Lake City "on the traffic here concerned" is not supported by substantial evidence and is erroneous as a matter of law, and whether the court further erred in its own holding that the existence of such through routes is established by the evidence and the law.

(8) Whether, in holding that through routes for the "bridge" traffic here concerned were in existence via the Rio Grande, the court erred in refusing to consider the fact that the evidence showed through movement of only one shipment of non-emergency traffic via the Rio Grande over each of only 17 of the many hundreds of thousands of through routes of which the Rio Grande claims to be a

part between the 2,900 railroad stations in the northwest area and the 39,000 stations in the eastern and southern parts of the country.

(9) Whether, in holding that through routes were in existence via the Rio Grande for the traffic here concerned, the court erred in failing and refusing to indicate or specify the through routes held to be in existence via the Rio Grande or the termini of, or the railroads comprising such through routes, or the commodities for which the court holds that through routes exist via the Rio Grande.

(10) Whether, in view of the fact that the Commission overcame the short haul prohibition in Section 15(4) by ordering through routes and joint rates on all the commodities it considered upon the evidence to be necessary in the public interest, the court erred in holding that the Rio Grande and the "entire proceeding" were "prejudiced" by the Commission's finding that through routes did not already exist via the Rio Grande for the traffic it seeks.

(11) Whether, if the last preceding question is answered negatively, the court erred in annulling and setting aside "the order" *only* "insofar as it denied and withheld relief" to the Rio Grande.

(12) Whether the court erred in holding that the Rio Grande was entitled to have the Commission, in determining whether joint rates via the Rio Grande should be required "apply the provisions of §1(4), §3(4), §15(1) and §15(3) of the Act, free of any of the limitations imposed by §15(4) with respect to establishing through routes".

(13) Whether the court exceeded its powers in making its own finding that the evidence proved discrimination against the Rio Grande, and thereupon in "remanding" the case to the Commission "for further proceedings in conformity with the opinion and judgment of this Court".

(14) Whether the court erred in failing to consider and review the entire record and all the issues tendered in briefs and arguments of the parties.

### STATEMENT

The Rio Grande operates a short-line railroad with its eastern termini at Denver, Pueblo and Trinidad, Colorado, and its western terminus at Ogden, Utah, the distance between Denver and Ogden being 607 miles via its main line, and 782 miles via Pueblo. Its history has been essentially one of financial difficulty and of bankruptcy. It has been a "financial needs" railroad throughout most of its existence.<sup>3</sup> Its mountainous location and tortuous physical features have resulted in "operating conditions on the Rio Grande" that are "more onerous than those on the lines of the Union Pacific" or any other transcontinental railroad, and caused the Commission in prior cases to grant the Rio Grande's demands for higher rates, based on its "financial necessities", than rates prescribed for other western railroads.<sup>4</sup>

3 *Denver & Rio Grande Investigation*, 113 I. C. C. 75; *Reconstruction Finance Corp. v. Denver & R. G. W. R. Co.*, 328 U. S. 495.

4 *Commercial Club, Salt Lake City v. A., T. & S. F. Ry. Co.*, 19 I. C. C. 218, 221-222; *W. H. Bintz Co. v. Abilene & S. Ry. Co.*, 216 I. C. C. 481, 486; *Livestock-Western District Rates*, 176 I. C. C. 1, 98 and 190 I. C. C. 175; *Utah Coal Operators Assn. v. Atchison, T. & S. F. Ry. Co.*, 218 I. C. C. 663.

The "Rio Grande was built for the purpose of handling the local business tributary to its line"<sup>5</sup> but its management soon determined to enhance its financial position by diverting traffic from other railroads for a "bridge"<sup>6</sup> haul over its line, including transcontinental Pacific Coast traffic moving over the Union Pacific-Central (now Southern) Pacific route, construction of which had been completed from Council Bluffs, Iowa, through Ogden, Utah, to Oakland, California, in 1869.

Pursuing its purpose to enhance its financial position by diverting traffic and revenues from other railroads, the Rio Grande's revenues from "bridge" traffic increased over 326 per cent in the 15-year period ending with 1948, while traffic originated and terminated on its line increased only 155 per cent and its local traffic originating and terminating at points on its line was less annually throughout that period than during the period 1924-1929.

Further pursuing its "bridge" traffic policy, the Rio Grande filed its complaint with the Commission in this

5 *Commercial Club, Salt Lake City v. A., T. & S. F. Ry., supra*, P. 221.

6 The term "bridge traffic" is used to designate traffic hauled by a carrier on whose line the traffic neither originates nor terminates. A "bridge haul" is the transportation of such "bridge" traffic some part of the distance between its point of origin and its final destination. "Bridge" traffic is most attractive because it is generally least expensive to haul since the "bridge" carrier performs none of the expensive branch line, gathering or switching services required at the point of origin and point of final destination. The Rio Grande's President testified that the reason it is pressing for more "bridge" traffic is that "there is more money in it" than in traffic it originates or terminates.

The traffic the Rio Grande seeks to divert to its line is "bridge" traffic which originates and terminates outside of Rio Grande territory. Joint rates already apply to traffic originated at or destined to points on the Rio Grande.

case on August 1, 1949. Although the complaint alleged violations of Sections 1(4), 3, 15(1) and 15(3) of the Interstate Commerce Act, the Rio Grande's President testified that the complaint was filed for the purpose of improving and enhancing its financial position by diverting for a "bridge" haul over its line so much as it can of about 172,000 carloads annually of transcontinental freight traffic now and for some 75 years moved under joint transcontinental rates over through routes which include lines of the Southern Pacific, Great Northern, Union Pacific, Northern Pacific and Milwaukee railroads (designated herein as "Union Pacific routes") between points in the northwestern states of Oregon, Washington, Montana, Idaho and Utah, north of Ogden (designated herein as "northwest area"), and points in the eastern and southern parts of the United States, generally east of the Missouri and Mississippi rivers, including points on the Atlantic and the Gulf coasts. As noted, these joint rates do not apply via the Rio Grande, except in instances not here involved, and they are lower than the combination or sum of the local rates that would have to be charged if the traffic moved via the Rio Grande.

The Rio Grande demanded before the Commission that its line be included in all of the multitude of through routes of other railroads to and from the northwest area over which the joint rates are applicable, despite the fact it has no trackage and performs no service in that area; that any route via the Rio Grande for movement of the involved traffic would be from 33 to 219 miles longer than the Union Pacific, and would range from 33 per cent to more than 50 per cent longer than routes maintained by the Union Pacific with other railroads; that movement of the traffic over the Rio Grande as a "bridge" line would require at least 24 hours more time

and one or two more terminal interchanges between carriers, and would short haul the Union Pacific and other railroads 925 miles.

Consistent with the protection afforded by Section 15(4) of the Act against short-hauling, and having their own direct and shorter routes, the Union Pacific and other roads serving the northwest area have always insisted, with immaterial exceptions, upon retaining their long hauls on traffic to and from that area.

No complaint has ever been filed by shippers or the public or by any state public service commission demanding the longer through routes and joint rates sought by the Rio Grande.

The order (R. 20) requires the Union Pacific and numerous other railroads, whose connecting lines form through routes extending from the Pacific to the Atlantic and Gulf coasts, to establish through routes with the Rio Grande and "the same" joint rates maintained on Union Pacific routes on westbound carloads of granite and marble monuments from Vermont and Georgia to points in the northwest area and on eastbound carloads of ordinary livestock, fresh fruits and vegetables, dried beans, frozen poultry, frozen foods, butter, and eggs from points in the northwest area to points in the eastern and southern parts of the country, indicated above. These articles

7. Union Pacific and some of the other railroad appellants have served the northwest for more than 75 years. Union Pacific now owns and operates 5,606.7 miles of railroad in that area, of which 2,913.19 miles, or over 50 per cent, consist of numerous branch lines extending from and serving as "feeders" to its main lines. About 50 per cent of the traffic the Rio Grande wants routed via its line originates and terminates on these branch lines. The Rio Grande demands and the effect of the order is that, all these main and branch lines serve as "feeders" of bridge traffic to its lines.

comprise about 57,000 carloads annually, or a third of the total volume of the traffic the Rio Grande seeks to divert to its line. Diversion of the traffic permitted by the order would result in a potential estimated revenue loss to the Union Pacific alone of more than \$11,000,000 annually, and in very large losses to others of the railroad appellants.

The order does not require through routes and joint rates with the Rio Grande on the remaining two-thirds of the traffic, and the Rio Grande's purpose in this suit is to enhance its financial gains still further by forcing the Commission to require that the joint rates over existing Union Pacific routes be made applicable via the Rio Grande on the remaining two-thirds of the traffic.

#### *The Commission's Findings and Conclusions*

The Commission made the following statement of the Rio Grande's contention concerning the existence of through routes via its line:

"The complainant contends that because the routes over which joint rates are sought are in existence and open to traffic at combination rates, we are not called upon to require the establishment of through routes and, therefore, the limitations on our power to do so in section 15(4) are not applicable and need not be considered." (R. 61)

After discussing the decision in *Thompson v. United States*, 343 U. S. 549, in which this Court nullified a Commission order based on the theory that a through route already existed over two connecting railroads because the route was open to traffic at the combination of their local rates, the Commission carefully analyzed the contentions and the testimony concerning the alleged existence of through routes via the Rio Grande in this case, and made the following finding and statements:

"We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic<sup>3</sup> [3 Except on east-bound shipments of sheep or goats, to which reference is made later in this report.] here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.

"The paramount issue in this proceeding, therefore, is whether the Ogden gateway should be made available to shippers for routing, at joint rates equal to those over competitive routes, of all traffic in connection with the Rio Grande between the areas involved. For the foregoing reasons, that issue falls within the limitations of section 15(3) and (4)." (R. 65)

Other findings by the Commission are:

1. That the proposed new route via the Rio Grande could not be required "unless the existing (Union Pacific) routes can be found not to provide 'adequate' transportation" (R. 101);

2. That the Union Pacific has surplus transportation capacity, is efficiently operated, furnishes good service to shippers over its line, and its "facilities are adequate to move over its own direct routes the present volume of traffic and any additional volume that may be anticipated in the foreseeable future" over routes that are shorter than Rio Grande routes (R. 94);

3. A large number of shippers and representatives of communities served by the Union Pacific, traffic, commercial and civic associations, opposed the Rio Grande's

complaint. These were from localities in Washington, Oregon, Idaho, Montana, Wyoming, Utah, Colorado, Nebraska, and Kansas. They were joined in their opposition by the public utilities commissions of those States, except Idaho, Utah, and Colorado (R. 97);

4. Shippers in opposition to the Rio Grande's complaint testified to the adequacy, efficiency, and satisfactory character of the service which they had received over the Union Pacific routes. They testified that they had never experienced any difficulty in marketing their products by reason of the lack of competitive joint through rates over the Rio Grande, and would not use that carrier in any event (R. 97);

5. That the Rio Grande route is from 33 to 219 miles longer than the Union Pacific, and that routes via the Rio Grande would be from 33 to 50% longer than many of the Union Pacific routes (R. 72, 103).

6. That evidence as to physical characteristics of the two lines shows that the Rio Grande is less favorably situated than the line of the Union Pacific; that traffic routed over the Rio Grande as a bridge line would require at least 24 hours more time in transit than when routed over the Union Pacific and would require one or two more terminal interchange services, and that operating conditions on the Rio Grande are "more onerous than those on the lines of the Union Pacific or any of the other transcontinental" lines (R. 94, 102);

7. That diversion of the traffic over the Rio Grande would deprive the Union Pacific of its long haul and would short haul it at least 925 miles in each instance (R. 73);

8. That the traffic sought by the Rio Grande ordinarily moves over Union Pacific routes through Wyoming because those routes are shorter and they offer lower rates than the Rio Grande (R. 69);

9. Concerning public need for the proposed Rio Grande route and damage to Union Pacific routes by diversion of traffic from them to the Rio Grande, the Commission found that it was impossible to determine or estimate accurately what volume of traffic might be diverted to the Rio Grande if all of the joint rates were made applicable over its line; but that whatever the volume so diverted would be the result of "active solicitation" by the Rio Grande "to persuade" shippers and receivers to use its line as an overhead or "bridge" route, the value of its service to shippers, and the extent to which the Rio Grande can "induce" shippers to route traffic via its line for the purpose of using transit facilities at points on its line and subsequent reshipment beyond at the balance of joint through rates from the point of origin (R. 78);

10. That there are substantial dissimilarities or differences between transportation conditions, operating conditions and lengths of hauls over Union Pacific routes and over the Rio Grande but that the differences in transportation conditions become "relatively insignificant" and "substantially similar" when "spread" over the longer hauls between the northwest area and the eastern and southern parts of the country (R. 103-104);

11. That the evidence failed to prove that the Union Pacific and other lines maintaining present through routes and joint rates discriminate against the Rio Grande (ex-

cept at points on the Bamberger Railroad between Ogden and Salt Lake City) under Section 3(4) of the Act in refusing to include its line in present through routes and joint rates (R. 104);

12. That (notwithstanding the dissimilarities in transportation conditions over the respective routes) the combination rates via the Rio Grande on the articles named in the order from and to the areas therein described are and for the future will be unjust and unreasonable and unduly ~~prejudicial to~~ shippers using, or desiring to use, the Rio Grande routes and unduly preferential of shippers and receivers using the Union Pacific routes, to the extent those rates exceed the joint rates maintained on such commodities from and to the same points over the Union Pacific routes (R. 105-106);

13. That the Rio Grande, a railroad, could not raise in its own behalf an issue of undue prejudice and preference under Section 3(1) against another railroad, but that testimony of intervening shippers raised that issue, and also raised a question as to a need for "more" adequate and economic service than afforded by Union Pacific routes with respect to perishable food articles (R. 65; 101);

14. That the present complex and far-flung marketing system for perishable food articles requires that such articles move to market with expedition and care "over as many routes as possible" to "as many markets and outlets as possible" with "as much flexibility as possible" and without "unnecessary interruptions" (R. 102; 88);

15. That, while ~~through~~ service over Union Pacific routes in general is as satisfactory to shippers as the service which could be provided over routes including

the Rio Grande, this is not true with respect to perishable food articles, and that shippers of those articles from the northwest area "are debarred from effective participation in the widespread system developed for the marketing of such commodities" (apparently, only because, if routed over the longer Rio Grande route to eastern and southern markets, higher rates apply than when routed via Union Pacific routes, for the undisputed evidence shows that those shippers market their products via Union Pacific routes in all 48 states and several foreign countries) (R. 102);

16. That on shipments of perishable food articles reconsigned or accorded transit privileges such as stopoff for partial unloading, storing, or processing in transit, or for feeding or grazing livestock in transit, at points on the Rio Grande, "the Union Pacific routes and the joint rates which apply over them are not available, and higher rates apply", and that "on such traffic the defendants' (Union Pacific) routes are inadequate and less economical than are the Rio Grande routes" (R. 102);

17. That through routes via the Rio Grande and joint rates "the same" as apply over Union Pacific routes for the commodities named in the order between points in the areas described therein are "necessary and desirable in the public interest, in order to provide adequate and more economic transportation" (R. 105).

#### *Opinion of the District Court*

The district court held:

1. That the Rio Grande has standing to maintain suit to enjoin and annul the Commission's failure to include in its order about two-thirds of the "bridge" traf-

for which the Rio Grande demanded joint rates via its line (and the court overruled a motion to dismiss the suit for lack of such standing);

2. That the Commission erred as a matter of law and upon the evidence in finding that the through routes claimed by the Rio Grande were not already in existence, that the evidence and law established the existence of the claimed through routes, and that the Commission should have applied the provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act "free of any of the limitations imposed by §15(4) with respect to establishing through routes" (R. 294).

In reaching its conclusion that the Rio Grande has standing to maintain its suit, the court made and apparently relied upon the following administrative finding of fact:

"Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines." (R. 297)

The court held that the Rio Grande is here seeking rates "which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" (R. 299) and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande", giving it a right to judicial review, but that "we do not think such injury is essential to the right to judicial review" (R. 295).

With respect to the Commission's finding that the claimed through routes via the Rio Grande were not in existence, the court held—

"This erroneous self-imposed restriction upon its authority to establish joint rates obviously prejudiced the entire proceeding." (R. 288)

Nevertheless, the court "remanded" the case to the Commission "with appropriate instructions" for further proceedings in conformity with the opinion *only* insofar as the Commission *failed* to order through routes and joint rates on the traffic not included in the order.

### SUMMARY OF ARGUMENT

I. As the Rio Grande's complaint assails *only* the Commission's failure to compel through routes and joint rates for commodities not named in the order, there is no jurisdictional basis for its suit because such "failure" is neither an "order" nor a part of the order issued. The conclusion in the Commission's report, "that except as indicated in the preceding findings, the allegations made in the complaint are not sustained" is not embodied in the order issued and is not subject to judicial review.

The district court erred in treating the Commission's failure to require through routes and joint rates for commodities not named in the order as a "negative" portion of the order issued. That order is entirely affirmative and completely favorable to the Rio Grande, and there is no order or any part of any order which "denied and withheld relief to the Rio Grande". Hence, the court below was without jurisdiction; *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522.

The affirmative order issued granting the Rio Grande's demands for through routes and joint rates on a third of the traffic it seeks may not be used as the jurisdictional basis for its attack upon the Commission's

failure to include more commodities than it did in the order issued, for a plaintiff "may not adopt the [order] as the basis of his suit and then attack it", *Baltimore and Ohio R. Co. v. Brady*, 288 U. S. 448, 458; nor may the Rio Grande misuse the order issued as a jurisdictional basis for obtaining through court proceedings "the same relief it failed to secure from the Commission", *Standard Oil Co. v. United States*, 283 U. S. 235, 241. Any other view "would propel the court into the domain which Congress has set aside exclusively for the administrative agency", *Securities Comm'n v. Chenery Corp.*, 332 U. S. 194, 196.

II. The district court plainly erred in denying the motion to dismiss the complaint on the ground that the Rio Grande has no legal right or standing to maintain the suit, since it admittedly has no semblance of a legal, equitable, statutory or other right to the traffic it seeks to divert to its line for the purpose of enhancing its financial position; nor does the Commission's failure to require through routes and joint rates on commodities not named in its order deprive the Rio Grande of anything it has previously possessed; or disrupt or threaten to disrupt or change the transportation situation of the Rio Grande or cause it any financial or economic loss.

The district court was correct in holding that the Commission's failure to grant the Rio Grande's full demands "required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had" and "caused no pecuniary loss to the Rio Grande", but the court erred in holding that as the Commission's failure to order through routes and joint rates on all commodities would prevent the Rio Grande "from enjoying increased traffic and increased earnings", it

"will result in pecuniary injury to the Rio Grande", giving it a right to maintain its suit.

There is no precedent for the lower court's decision and it is directly contrary to consistent and repeated holdings of this Court that to maintain a suit to enjoin an order of the Commission the complainant must show that the order subjects him to legal injury actual or threatened. *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 148. The Rio Grande's complaint in the lower court fails to allege any ground upon which standing to maintain its suit could be sustained.

The Commission's failure to grant the Rio Grande's full demands was not, as held by the lower court, a denial of a right given the Rio Grande by the Interstate Commerce Act, but was the result of an adjudication and findings by the Commission upon adequate evidence that the Rio Grande had not sustained its case except to the extent indicated in the order. Neither its right to complain to the Commission nor the fact that it was a party to the proceeding gives the Rio Grande a right to maintain a suit to enjoin and set aside the order or the Commission's failure to grant the Rio Grande's full demands. *Sprunt & Son v. United States*, 281 U. S. 249, 255; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486; *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 147.

III. In finding that there are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden on the traffic concerned, the Commission correctly applied the test of the existence of a through route, namely "whether the participating carriers hold themselves out as offering through transportation," and the "carriers' course of business" test

laid down by this Court in *Thompson v. United States*, 343 U. S. 549.

Refusing to be guided by those tests, the district court erroneously reversed the Commission's finding and made its own finding that the same evidence considered by the Commission proved that the through routes contended for by the Rio Grande were in existence. Nor did the court specify or indicate what railroads composed what routes, between what points or termini, or on what commodities it thought through routes were in existence via the Rio Grande for the traffic concerned. The court inconsistently and erroneously refused to decide whether the meager evidence was sufficient to prove the existence of through routes via the Rio Grande between each of the 39,000 stations in the eastern and southern parts of the country and the 2,900 stations in the northwest area but remanded that problem to the Commission.

The facts summarized and presumably relied upon by the court were not even a scintilla of proof that the millions of through routes between all the stations in the east and south and all the stations in the northwest area were in existence via the Rio Grande within the meaning of the Act. The evidence showed that through routes and joint rates had existed via the Rio Grande during court receivership of the Union Pacific but were cancelled in 1906 and 1912; that only one shipment from each of 18 origins in the middlewest and east that moved at combination rates via the Rio Grande in 1948 to 9 destinations in the northwest area; that a few shipments moved from the northwest area to destinations on the Rio Grande, and that shipments were detoured over the Rio Grande under emergency conditions during World War II and blizzards that blocked the Union Pacific route a few days

in 1949. The Commission correctly held that these few isolated shipments did not prove the existence of through routes via the Rio Grande, and that:

"Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States, supra.*"

The Commission further and correctly found that "the carriers' course of business" has been and is to use Union Pacific routes, except where called upon to use the Rio Grande routes "by force of shippers' or connecting carriers' routing", that the whole "course of conduct" of Union Pacific "has been for many years and is now to guard jealously its long haul and not to open commercially the Rio Grande routes on this traffic", and that the movement of the few shipments via the Rio Grande in 1948 proved—not "the carriers' course of business" but only exceptions to it.

Every relevant or material factor recited in the opinion of the lower court was rejected or held insufficient by this Court in annulling the Commission's order in *Thompson v. United States*, 343 U. S. 549, because the order had the effect of reducing the short-haul prohibition of Section 15(4) to "unnecessary surplusage", and "was without evidentiary support under the accepted tests for determining the existence of a through route".

IV. The lower court erred in holding that the Commission's finding that <sup>no</sup> through routes existed via the Rio

Grande for the involved traffic "obviously prejudiced the entire proceeding". The Commission, after making that finding, proceeded to require establishment of through routes and joint rates via the Rio Grande for all commodities which the evidence showed to be necessary in the public interest. It was insufficiency of the evidence to prove public interest and not its finding that there were no through routes via the Rio Grande for the involved traffic that caused the Commission to require through routes and joint rates only for the commodities listed in its order.

But if the court were right in holding that the Commission's finding "prejudiced the entire proceeding", then the court clearly erred in annulling and remanding to the Commission only that "part" of the case in which the Commission had failed to require through routes and joint rates on commodities not named in its order, for, if "the entire proceeding" was "prejudiced", the court was powerless to save that part of the administrative action which was favorable to the Rio Grande by refusing to remand that "part" as well as the unfavorable "part" to the Commission, and in attempting to do so the court clearly exceeded its power and usurped administrative authority.

V. The district court erred in confusing and commingling separate and independent provisions of the Act and in treating the case hypothetically, as if the Commission had not already heard and adjudicated the contentions and issues raised by the Rio Grande's complaint. It is clearly illogical and erroneous to hold, as the lower court did, that the Rio Grande was entitled to an order requiring joint rates if the evidence showed that the combination rates via its line were unreasonable, dis-

criminatory or unduly prejudicial, for such findings do not involve public interest, whereas, the Commission can order joint rates only after finding them to be necessary "in the public interest". The power to order through routes and joint rates may not be used to remedy rates found unreasonable, discriminatory or unduly prejudicial *Thompson v. United States*, 343 U. S. 549.

VI. The district court usurped administrative authority and exceeded its power by making findings of fact favorable to the Rio Grande and thereupon remanding that "part" of the case "with appropriate instructions" to the Commission for further proceedings "in conformity with this opinion". In making its own finding that the evidence proved discrimination against the Rio Grande and, thereupon, remanding the case for further proceedings in conformity with such findings, the court ties the Commission's hands and destroys its administrative discretion. This error of the court derives from its first error in exceeding its power to review the Commission's failure to grant the Rio Grande's full demands and amounts to a "substitution of judicial for administrative discretion", *Communications Comm'n v. WOKO*, 329 U. S. 223, 229. The statutory power to enjoin, annul, suspend or set aside an order in part "does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it", *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 483.

In exercising the power to review an administrative order—" \* \* \* the court must act within the bounds of the statute and without intruding upon the administrative province", *Ford Motor Co. v. Labor Board*, 305 U. S. 364, 373.

## ARGUMENT

### I.

The District Court Erred in Failing to Dismiss the Complaint on the Ground That, as the Commission's Failure to Compel Through Routes and Joint Rates for Commodities not Named in the Order is Neither an "Order" nor a Part of the Order Issued, There is no Jurisdictional Basis for Court Review.

The district court said (R. 281-282):

"By the challenged order entered on January 12, 1953, the Commission granted some but not all of the relief sought by the Rio Grande. 287 I. C. C. 611. In this action the Rio Grande seeks to have the court enjoin, set aside, annul and remand, with appropriate directions, *that part of the order which denied relief sought by the Rio Grande.*" (Italics added.)

In other words, the matter of which the Rio Grande complained to the court was the Commission's *failure* to order through routes and joint rates on *all* commodities instead of the limited number named in the order.

The final judgment and decree states that the Commission's order dated January 12, 1953, is annulled and set aside "insofar as it denied and withheld relief."

Urgent Deficiencies Act (28 U. S. C. §§ 1336, 1398) confers upon the courts power and jurisdiction to enjoin, set aside, annul or suspend in whole or in part any "order" of the Commission. There is nothing to which a court's jurisdiction can attach unless and until the matter complained of has been followed by and embraced in a formal "order", *United States v. Atlanta, B. & C. R. Co.*, 282 U. S. 522.

The only order issued by the Commission in this case is the order of January 12, 1953, affirmatively requiring through routes and joint rates for a third of the traffic the Rio Grande seeks to divert to its line. That order directs the railroads to establish through routes and joint rates with the Rio Grande for the articles therein named, prohibits them from charging rates in excess of those prescribed, and requires them to cease and desist from practicing undue prejudice and preference and unlawful discrimination referred to in the first paragraph of the order.

But there is no "part" of that order, nor is there any order or "part" of any order which "denied and withheld relief" to the Rio Grande, or refused to require through routes and joint rates on articles other than those named in the order issued. As that order is silent as to articles not named therein, the matter complained of by the Rio Grande is not embraced or touched upon in the order issued or in any other order.

Upon finding that through routes and joint rates were necessary for the articles specified in its findings, the Commission stated in conclusion "4" (R. 106)—

"That except as indicated in the preceding findings, the allegations made in the complaint are not sustained."

But that conclusion is not embraced in the order issued or embodied in any order or part of any order. The decree below, therefore, attempts to annul and set aside the Commission's mere *failure to issue an order* with respect to articles not named in the order it did issue.

This Court has expressly held that "matter", conclusions or findings contained in a Commission report,

but not followed by and embraced in a formal "order", are not subject to judicial review. In *United States v. Atlanta, B. & C. R. Co.*, *supra*, the Commission had issued a report at the end of which it stated its final conclusion and said that the carrier "will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report" (p. 524). But the Commission issued no "order". Rejecting the railroad's contention that the language just quoted was "equivalent" to, or "amounts to an order", this Court held, pages 527-528:

"The action here complained of is not in form an order. It is a part of a report—an opinion, as distinguished from a mandate. The distinction between a report and an order has been observed in the practice of the Commission ever since its organization—and for compelling reasons.

\* \* \* \* \*

"No case has been found in which matter embodied in a report and not followed by a formal order has been held to be subject to judicial review."

The Rio Grande has sought to escape the decision in the *Atlanta* case, *supra*, by arguing that the order issued must be read in the light of the Commission's report which is made a part of the order, citing *Georgia Comm. v. United States*, 283 U. S. 765, 771, and *American Express Co. v. Caldwell*, 244 U. S. 617, 627, and that the Commission's "conclusion" number 4, when so imported into the order, becomes "the equivalent of a dismissal", and, therefore, is an "order".

Those decisions hold that the report may be read in connection with the order for the purpose of clarifying any vagueness, indefiniteness or ambiguity in an order.

actually issued. But neither those decisions nor any others hold that the Commission's report must or may be read for the purpose of creating an order or "the equivalent" thereof where conclusions and findings in the report have not actually been embraced in a formal order. No stronger case of "the equivalent" of an order could be imagined than the *Atlanta* case, *supra*, but this Court held that jurisdiction to review was lacking because the action complained of was "not in form an order."

If, in the instant case, the Commission had concluded that none of the allegations of the complaint had been sustained and had issued no order, the situation would have been identical to that in the *Atlanta* case. The fact that the Commission issued the affirmative order requiring through routes and joint rates on some articles does not alter the fact that it issued no order embracing its failure to include other commodities in its order.

The order issued, being completely favorable to the Río Grande (and now being defended by it in this Court, No. 117, *The Denver and Rio Grande Western Railroad Company v. Union Pacific Railroad Company, et al.*), may not serve as a jurisdictional basis for its attack upon the Commission's failure to include more commodities than it did in the affirmative order issued, for a plaintiff "may not adopt the [order] as the basis of his suit and then attack it", *Baltimore and Ohio R. Co. v. Brady*, 288 U. S. 448, 458, citing *Mitchell Coal Co. v. Penna. R. R. Co.*, 230 U. S. 247, holding at page 258 that a "plaintiff can not claim under the act and against it".

The favorable order issued may not be misused by the Río Grande as a jurisdictional basis for obtaining

through court proceedings "the same relief it failed to secure from the Commission", *Standard Oil Co. v. United States*, 283 U. S. 235, 241. Any other view "would propel the court into the domain which Congress has set aside exclusively for the administrative agency", *Securities Comm'n v. Chenery Corp.*, 332 U. S. 194, 196.

The position of the Rio Grande in this case is identical to that of the complainant in *Brady v. Interstate Commerce Commission*, 43 F. 2d 847, affirmed Per Curiam, 283 U. S. 804. In that case Brady asked the Commission for an order awarding him damages exceeding \$57,000 because of alleged discrimination against him by failure of two railroads to furnish him coal cars. The Commission did not order the full damages sought. Instead, it issued an order awarding Brady \$12,838.31. Brady brought suit under Urgent Deficiencies Act, asking that "certain parts" of the order "be set aside and annulled" (p. 848). The district court held that the suit clearly should be dismissed "for the reason that it seeks not to set aside the order of the Commission, but to correct alleged errors in the findings of the Commission upon which that order is based" (p. 850). Holding that it was without jurisdiction over the matter of which Brady complained, the court said, p. 850:

"What complainant is asking is not that we set aside the order of the Commission, which directs the payment to him of \$12,838.31, but that we set aside the findings upon which his damages were reduced and direct the Commission to reopen the proceeding and make 'corrected findings and a supplemental order.' In other words, he seeks to have us review the findings of the Commission and correct its errors as upon a writ of error or appeal; but this we have no power to do. *Western N. Y. & P. R. R. Co. v. Penn. Refining Co.* (C. C. A. 3rd), 137 F. 343, 354.

And see *I. C. C. v. Waste Merchants' Ass'n*, 260 U. S. 32, 43 S. Ct. 6, 67 L. Ed. 112; *Bartlesville Zinc Co. v. Interstate Commerce Commission*, 58 App. D. C. 316, 30 F. (2d) 479, and *Northern Pac. Ry. Co. v. I. C. C.*, 57 App. D. C. 318, 23 F. (2d) 221, holding that errors of the Commission cannot be corrected by mandamus or certiorari."

Attempting to overcome the absence of an order or any part of an order embracing the matter of which the Rio Grande complained, the court below said that the fact that "the portion of the order here assailed was negative in character no longer affords a ground for the denial of judicial relief", citing *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, and *Mitchell v. United States*, 313 U. S. 80. But clearly the court either confused the abolition of the "negative order doctrine" by the *Rochester* case with the jurisdictional necessity for an actual formal order embracing the matter of which the Rio Grande complained, or attempted to stretch the ruling in that case to include a case in which the Commission has issued no order at all embodying its failure to grant the remaining two-thirds of the Rio Grande's affirmative demands.<sup>8</sup>

- 8 The order reviewed in *U. S. v. Great Northern R. Co.*, 343 U. S. 562 (No. 151, Oct. Term 1951, Transcript of Record, pages 24-25), "denied" an application to abandon the Montana Western, ordered joint rates in lieu of combination rates and prescribed divisions of the joint rates.

And compare orders granting "in part" and denying "in part", applications for motor carrier operating rights. In such proceedings the Commission's report generally recites the extent to which the evidence justifies the application, and an order is entered, as follows:

"It is ordered, That said application, except to the extent granted in said report, be, and it is hereby, denied." (No. MC-61396 (Sub-No. 32) *Herman Bros. Inc.*, Extension—Kansas and Other States, June 30, 1955, unreported.)

Our contention that the jurisdictional basis for review is lacking here is not based on the "negative" character of the Commission's failure to require through routes and joint rates on commodities not included in its order, but upon the fundamental fact that here, as in the *Atlanta* case, there is no order at all, or any part of an order embodying the failure of the Commission to require through routes and joint rates on more articles than those named in the order. To make our position clearer, if possible, we point to the fact that in all of the cases in which judicial review was denied because the Commission's orders were "negative", there were in fact actual "orders", in form, dismissing complaints that had been filed with the Commission. (See cases reviewed and discussed in *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125.) Such "order" dismissing the complaint had actually been issued in *Mitchell v. United States*, 313 U. S. 80, and, adhering to its decision in the *Rochester* case, this Court, upon holding that Mitchell had standing to maintain the suit because the order deprived him of his Constitutional rights, proceeded to review the order, regardless of its negative character. But *there was an order in form and in reality* and not, as here, a complete absence of an order embodying the non-action of the Commission of which the Rio Grande complained to the court.

In *Shannahan v. United States*, 303 U. S. 596, the Commission had issued a report in which it concluded that a certain electric railway was subject to the Interstate Commerce Act, but issued no order. In affirming the district court's dismissal, for want of jurisdiction, of a suit to enjoin and annul the Commission's decision, this Court held at page 599:

"Its decision is not even in form an order. It had no characteristic of an order, affirmative or negative." (citing cases)

The Court further held that:

"\* \* \* The determination \* \* \* is clearly not an order enforceable within the meaning of the cases construing and applying the Urgent Deficiencies Act. It is a decision on a controverted matter, comparable to that considered in *United States v. Los Angeles & Salt Lake R. R. Co.*, 273 U. S. 299, in *Great Northern Ry. Co. v. United States*, 277 U. S. 172, in *United States v. Atlanta B. & C. R. Co.*, 282 U. S. 522, and in *United States v. Griffin*, ante, p. 226, which were held not to be subject to review under the Urgent Deficiencies Act."

This Court has explained that where the Commission has failed to grant a part of the "relief" demanded, the courts will not interfere through judicial review because to do so would be to exercise or usurp administrative authority. In *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, the Commission had issued an order requiring certain carriers to establish joint rates, but it declined to comply with the demand of some of the carriers that it also prescribe divisions of the joint rates. This Court reviewed the affirmative order issued but refused to review the Commission's failure to fix divisions, holding that in seeking review of the Commission's failure to fix divisions, the appellants were in effect asking the Court to "exercise administrative authority where the Commission has failed or refused to exercise it." In *Chicago Junction Case*, 264 U. S. 258, the Court cited a number of cases at page 264, in which, the Court said, judicial review was refused "not because the order \* \* \* was negative in character," but that this Court declined to interfere "because to do so would have involved exercise by it of the administrative function of granting the relief" which the Commission had failed to grant.

There being no "order" embodying or carrying into effect the Commission's *failure* to include all commodities in the order it issued, the lower court erred in failing to dismiss the Rio Grande's complaint on the ground that there is no order or part of an order giving the court jurisdiction to review the matters of which the Rio Grande complained.

## II.

**The District Court Erred in Denying the Motion to Dismiss on the Ground That the Rio Grande has no Legal Right or Standing to Maintain This Suit.**

The Rio Grande's complaint to the Commission demanded joint rates that would afford it the opportunity to improve its financial position by short-hauling the appellant railroads 925 miles and diverting for a "bridge" haul over its line through traffic from which the Union Pacific alone earns over \$49,000,000 annually. The order issued by the Commission grants the demand to the extent of about one-third of the traffic from which the Union Pacific earns over \$11,000,000 annually. The Rio Grande filed this suit in the district court for the purpose of obtaining equal joint rates which it "failed to secure from the Commission" on the remaining two-thirds of the traffic (see *Standard Oil Co. v. United States*, 283 U. S. 235, 241).

These appellants filed a motion in the district court to dismiss the suit on the ground that as the Rio Grande has no legal or other right to the traffic it seeks to divert to its line, it has no standing to maintain the suit.

The decisions of this Court hold that a plaintiff has no standing to maintain a suit to enjoin an order of the Commission unless his complaint shows that the order

subjects him to legal injury, actual or threatened, *Edward Hines Trustees v. U. S.*, 263 U. S. 143; *Sprunt & Son v. United States*, 281 U. S. 249, 257; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486; *Moffat Tunnel League v. U. S.*, 289 U. S. 113, 119; or that the order would deprive him of something he has long and lawfully possessed, or would disrupt or materially change the transportation situation causing him financial or economic loss, or that the right to maintain such suit rests upon some express statutory provision, *Western Pacific v. South. Pac. Co.*, 284 U. S. 47; *Claiborne-Annapolis Ferry v. U. S.*, 285 U. S. 382; *Chicago Junction Case*, 264 U. S. 258, 267; *Alton R. Co. v. United States*, 315 U. S. 15, 19.

This Court held in *A., T. & S. F. Ry. v. United States*, 279 U. S. 768, 780, that:

"There is no rule of law or practice which gives to a carrier the right to recapture traffic which it originated."

The district court, though denying the motion to dismiss, conceded that the Commission's failure to grant the full demands "required no affirmative action by the Rio Grande and took nothing away from the Rio Grande which it already had", and from that standpoint "caused no pecuniary loss to the Rio Grande" (R. 293-294), but would, nevertheless, prevent the Rio Grande "from enjoying increased traffic and increased earnings" and, therefore, "will result in pecuniary injury to the Rio Grande", giving it a right to judicial review (R. 299, 295).

Keeping in mind the consistent rulings of this Court, the fact that the "order" does not deprive the Rio Grande of anything it already had and does not disrupt the transportation situation or subject the Rio

Grande to any penalty or adverse economic burden, the fact that the Rio Grande's only purpose in prosecuting this suit is to reap financial gain beyond the extent permitted by the Commission's order, and the fact that the Rio Grande admittedly has no legal or other right to enhance its financial position by diverting "bridge" traffic to its line from other railroads, it is clear beyond doubt that the district court erred in holding that the Rio Grande has standing to maintain this suit.

The purpose of the short-hauling prohibition in Section 15(4) of the Act is "to protect the long haul routes of carriers", *United States v. Mo. Pac. R. Co.*, 278 U. S. 269, 277, and it is a distortion of that purpose to contend or suggest that there is any hint of a legislative sanction of a right in the Rio Grande to short haul the railroad appellants 925 miles so that it may improve its financial condition by diverting for a "bridge" haul over its line traffic originated and terminated on the lines of the railroad appellants. Indeed, Section 15(4) requires that in prescribing through routes the Commission shall "give reasonable preference to the carrier by railroad which originates the traffic." And that section contains the further mandate that:

"No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs."

All of this, we submit, conclusively demonstrates that the Rio Grande has no semblance of a legal or other right to take from Union Pacific routes the traffic it seeks for a "bridge" haul over its line, and, hence, no standing to maintain this suit.

Although the district court refrained from specifying the precise ground or reason for its holding that the Rio Grande has standing to maintain the suit, it did hold that the Rio Grande here seeks rates that "will result in pecuniary profit to the Rio Grande . . . the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings" and that "the denial of the relief here challenged will result in pecuniary injury to the Rio Grande" but that, nevertheless, such injury is not essential to the right to judicial review (R. 299, 295).

The opinion states (R. 284):

"At the threshold we are confronted with a motion of the defendants to dismiss on the ground that the Rio Grande is without standing to maintain this suit. We hold that the Rio Grande has such standing. Since we so hold, by reason of our conclusion with respect to the existence of the through routes, the erroneous finding of the Commission on that issue, the erroneous application of the facts by the Commission of certain provisions of the Act, and the rights of the Rio Grande under the provisions of the Act, we shall state in detail our reasons for denying such motion, after a full consideration of the merits."

But nowhere does the opinion assert, ~~nor~~ has the Rio Grande alleged or claimed that it has any legal, equitable or other right to the additional "pecuniary gain" it seeks in this suit from the diversion of traffic to its line from these appellant railroads." Nevertheless, in final

9 To the contrary, the Rio Grande argued as follows at page 111 of its original brief in the district court:

"Neither the Union Pacific nor any other railroad has an absolute right to the exclusive occupancy of a particular territory or  
(Continued on next page)

analysis, and though lacking in specificity, the court's decision, that the Rio Grande has standing to maintain the suit necessarily rests upon the proposition that, regardless of its utter lack of any legal or other right to the traffic it seeks, the Rio Grande has standing to maintain this suit because the Commission failed to grant its demands for an opportunity to reap "pecuniary profit" and enhance its revenues from all, instead of a part, of the traffic it seeks to divert for a "bridge" haul over its line.

There is no precedent for the court's holding, and it is directly contrary to the decisions cited above and to the rule laid down by this Court that in order to maintain a suit to enjoin acts of others the complainant must show that he is threatened not only with a "loss" but also a loss against which he is legally or equitably entitled to protection, *Alabama Power Co. v. Ickes*, 302 U. S. 464; *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118. In the *Alabama* case, the Power Company sued to enjoin the Federal Administrator of Public Works from making loans and grants under a federal statute to certain municipalities for construction of electricity distribution systems, the competition of which the Company alleged would result in great and destructive loss and

(Continued from preceding page)

to the traffic which terminates or originates in the territory. *Pennsylvania R. Co. v. United States*, 40 Fed. (2) 921; *Indian Valley R. Co. v. United States*, 52 Fed. (2) 485, and *Chesapeake and Ohio Ry. Co., Construction*, 267 I. C. C. 665, 679. In *United States v. American Railway Express Co.*, 265 U. S. 425, 437, the court held that a carrier has no absolute right to the traffic it originates or to its long haul. Such rights as a railroad may have to its long haul on interstate commerce are granted and limited by the Interstate Commerce Act. Moreover, that Act does not give the originating railroad or any railroad the unequivocal right to its long haul in connection with through routes."

injury to its business of producing, distributing and selling electricity. The Court held that the Power Company had no standing to maintain its suit, saying, at page 478:

"Unless a different conclusion is required from the mere fact that petitioner will sustain financial loss by reason of the lawful competition which will result from the use by the municipalities of the proposed loans and grants, it is clear that petitioner has no such interest and will sustain no such legal injury as enables it to maintain the present suits."

After making it clear that to maintain a suit for an injunction, a party must show that the thing complained of threatens or causes him "direct injury" in a legal sense, meaning "a wrong which directly results in the violation of a legal right", the Court undertook to define or describe, at page 479, the injury essential to the maintenance of a suit for injunctive protection, as follows:

"An injury, legally speaking, consists of a wrong done to a person, or, in other words, a violation of his right. It is an ancient maxim that a damage to one, without an injury in this sense, (*damnum absque injuria*,) does not lay the foundation of an action; because, if the act complained of does not violate any of his legal rights, it is obvious, that he has no cause to complain... want of right and want of remedy are justly said to be reciprocal. Where therefore there has been a violation of a right, the person injured is entitled to an action.' *Parker v. Griswold*, 17 Conn. 288, 302-303. The converse is equally true, that where, although there is damage, there is no violation of a right no action can be maintained."

Holding that, since the Power Company had no legal or equitable right to be free of competition of other electric power plants, it had no standing to maintain

its suit to prevent such competition even "if its business be curtailed or destroyed" by such competition. Later on, the Court held that a "legal interest" which qualifies a complainant to sue—

"\* \* \* is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty."

and that—

"The only injury of which he can be heard in a judicial tribunal to complain is the invasion of some legal or equitable right."

Since the Rio Grande admits, as it must, that it has no legal right to the traffic it seeks to divert to its line for a "pecuniary gain", and, indeed, that no carrier has an absolute right even "to the traffic which terminates or originates" on its line, it clearly has no standing to maintain suit to enjoin the Commission's failure to grant its full demands even if, as erroneously held by the lower court, its desire for a "pecuniary gain" be treated as a "pecuniary injury", for, as held in the *Alabama* case, such "pecuniary injury", would not be the result of an "invasion of some legal or equitable right" of the Rio Grande.

If, as held in the cases cited, a complainant has no standing to maintain a suit to enjoin acts of others *which threaten even to destroy his business* unless he shows that such acts invade some legal or equitable right of his own, *a fortiori* the Rio Grande having no prior claim to the traffic and no express statutory right to sue, is without standing to maintain suit to enjoin the Commission's failure to grant a part of its demands for "pecuniary profit" to be obtained by diverting to its line traffic to

which it admits that it has no semblance of legal or other right.

Being unable to point to any legal, equitable or other right of the Rio Grande to a "pecuniary profit" by diverting traffic to its line from other railroads, the district court seemed to think it could sustain standing to maintain this suit because the Act gives the Rio Grande a right to complain to the Commission of discrimination against it by other railroads. The opinion states (R. 295):

"Where an order of the Commission denies a right given to a carrier by the Act and the denial of such right adversely affects the revenues of the carrier, causing it to suffer pecuniary injury, such carrier has a right to a judicial review of the order."

Continuing to theorize, hypothesize and speculate concerning the Rio Grande's rights under the Act, the opinion says that if, before the Commission, the Rio Grande established its right to the relief prayed, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and that "denial of such relief was the denial of a right given by the Act to have such just and reasonable through rates established"; and, if on the Rio Grande's showing before the Commission and application of Sections 1(4), 3(4), 15(1) and 15(3), the Rio Grande was entitled to an order establishing such joint rates, then the denial of such order "deprived the Rio Grande of a pecuniary gain to which it was entitled" because the granting of the joint rates would have resulted in a large increase in the Rio Grande's traffic and income; and again, if, under the facts established by the evidence and the application of Sections 1(4), 3(4), 15(1) and 15(3), of the Act, the Rio Grande was entitled to an order requiring such joint rates, then

the denial of that right resulted in pecuniary injury to the Rio Grande (R. 294).

But all of this theorizing in the opinion completely ignores and gives no effect whatever to the fact that the Commission has heard and adjudicated the Rio Grande's complaint and has found that the evidence failed to prove discrimination against it, and failed to prove that joint rates were necessary in the public interest except upon the commodities named in the order. This part of the opinion below goes extremely far toward holding that, upon the mere exercise of its right to complain to the Commission of discrimination and to submit such evidence as it had in support of its complaint, the Rio Grande had a right under the Act to equal joint rates on all of the traffic it sought, and that the Commission had no alternative but to find that the alleged discrimination was being practiced and to issue an order granting *in toto* the full "relief" demanded by the Rio Grande. Such a view of the Commission's power is not only contrary to the statutory pattern, but is also foreclosed by decisions of this Court, such as *United States v. Merchants &c. Ass'n*, 242 U. S. 178, wherein it was said at pages 186-187:

"In other words, the Commission granted a part of the relief asked. The District Court says it had no power to do so. But there is nothing in the act to justify limiting the power of the Commission to either a grant or a denial *in toto* of the precise relief applied for. Such a construction \* \* \* is at variance with the broad discretion vested in the Commission and the prevailing practice of administrative bodies."

In any event, this Court has repeatedly held that neither the right of a party to complain to the Commis-

sion nor the fact that a party participated in the proceeding in which an order was issued affords any standing to maintain a suit to enjoin the order. *Edward Hines Trustees v. U. S.*, 263 U. S. 143, 147; *Sprunt & Son v. United States*, 281 U. S. 249, 255; *Pittsburgh & W. Va. Ry. v. U. S.*, 281 U. S. 479, 486.

If the bare right to complain and present evidence to the Commission affords the Rio Grande standing to maintain this suit, then every litigant before the Commission has standing to maintain suit to enjoin the Commission's failure to grant every bit of administrative "relief" demanded of the Commission, with the result that a right to judicial review is opened up to every disappointed litigant before the Commission.

The opinion below cites the *Chicago Junction Case*, 264 U. S. 258, but the legal right and standing of the complaining railroads to maintain the suit in that case was sustained by this Court—not because the order failed to grant them "pecuniary gain", but, as stated at page 266, because the order resulted in a loss to them of \$10,000,000 annually by diversion from their lines traffic they had previously enjoyed. Standing to maintain that suit was sustained also because the order denied plaintiffs "equality of treatment" in the joint use the terminal properties, control of which the order transferred to the New York Central, and because the Transportation Act, 1920, had made provision for "securing joint use of terminals", and prohibited acquisition of a railroad by another unless authorized by the Commission. The Court held at page 267:

"By reason of this legislation, the plaintiffs, being competitors of the New York Central and users of the terminal railroads theretofore neutral, have a special interest in the proposal to transfer the control to that company."

Although the court below held that the Commission's failure to grant all of the "pecuniary gain" demanded by the Rio Grande results in "pecuniary injury" it said "we do not think such injury is essential to the right to judicial review", citing *Mitchell v. United States*, 313 U. S. 80. But the court failed to recognize the real ground upon which this Court held that Mitchell was entitled to judicial review of the order in his case. At page 94 the opinion points out that Mitchell had bought a first-class fare for the entire journey from Chicago to Hot Springs, Arkansas, and had offered to pay the proper charge for a seat which was available in the Pullman car from Memphis to Hot Springs, but he was—

"\* \* \* compelled, in accordance with custom, to leave that car and to ride in a second class car and was thus denied the standard conveniences and privileges afforded to first-class passengers. This was manifestly a discrimination against him in the course of his interstate journey and admittedly that discrimination was based solely upon the fact that he was a Negro."

After saying that whether this was a discrimination forbidden by the Act was not a question of giving effect to state "segregation" laws but one of "equality of treatment", the Court held at page 94 that the denial of equal accommodations to Mitchell because of his race was "an invasion of a fundamental individual right which is guaranteed against state action by the Fourteenth Amendment" to the Constitution of the United States and that such discrimination was "essentially unjust" and could not be deemed "to lie outside the purview of the sweeping prohibitions" of the Act. At page 97, the Court held:

"On the facts here presented, there is no room  
\* \* \* for administrative or expert judgment with

respect to practical difficulties. It is enough that the discrimination shown was palpably unjust and forbidden by the Act."

Thus, Mitchell was entitled to judicial review of the order in that case, because the discriminatory conduct of which he complained violated his Constitutional rights, and he was therefore entitled to the Court's determination of the question whether the Commission committed error of law in holding that Section 3 of the Act did not forbid conduct which the Court found to be so clearly discriminatory as to violate his Constitutional rights.

But the decision in that case is clearly inapposite here because the Rio Grande has no Constitutional, legal, equitable or other semblance of a right to wrest additional "pecuniary gain" from these appellant railroads by diverting traffic they originate and terminate to its line for a "bridge" haul.

The district court also cites *Youngstown Co. v. U. S.*, 295 U. S. 476, in which this Court distinguished other cases, saying that judicial review was refused in those cases because the parties had no legal interest or capacity to sue, "or failed to allege that the rates under attack were unreasonable or discriminated against them". The Rio Grande's amended complaint in this case contains such an allegation, but if it is entitled to judicial review of the order merely because it makes that allegation in its complaint to the court, then, as there is nothing to prevent anyone from making such allegation, everyone has standing to maintain a suit to enjoin the Commission's failure to find rates unreasonable.

The order in the *Youngstown* case was not sustained by any finding of this Court that the rates prescribed by

the Commission's order were in fact just and reasonable, but upon the ground that the prescription of the rates was within the Commission's authority and that its order was adequately supported by its findings and the evi1ence of record.

And, more important, such allegation attempts to present to courts an administrative question of fact which they are powerless to determine, for every decision of this Court on the point since it decided *Texas and Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U. S. 426, has held without exception that the courts have no power or jurisdiction to determine whether an interstate rate is unreasonable, discriminatory or otherwise in violation of the Act.<sup>10</sup>

Furthermore, the district court ignored the fact that the order in the *Youngstown* case increased the rates of the Youngstown Company as much as 18¢ per net ton, or \$9.00 per 50-ton car, and apparently this Court felt that the shipper was entitled to have the court determine whether

10 See *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470; *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, 481-483; *Assigned Car Cases*, 274 U. S. 564, 581; *Swayne & Hoyt, Ltd. v. U. S.*, 300 U. S. 297, 303-304; and *Montana-Dakota Co. v. Pub. Serv. Co.*, 341 U. S. 246, in which this Court held at pages 251-252:

"Petitioner cannot separate what Congress has joined together. It cannot litigate in a judicial forum its general right to a reasonable rate, ignoring the qualification that it shall be made specific only by exercise of the Commission's judgment, in which there is some considerable element of discretion. It can claim no rate as a legal right that is other than the filed rate, whether fixed or merely accepted by the Commission, and not even a court can authorize commerce in the commodity on other terms.

"We hold that the right to a reasonable rate is the right to the rate which the Commission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable one."

the Commission committed any error of law in issuing an order imposing such a tremendous additional financial burden.

In the instant case the district court sustains the Rio Grande's standing to maintain the suit—not because the “order” subjects it to any additional financial or other burden—but because the Commission failed to grant the additional “pecuniary gain” the Rio Grande seeks in this suit, to which neither the court nor the Rio Grande can claim it has any legal or other right.

The district court also cites *Rochester Tel. Corp. v. U. S.*, 307 U. S. 125, but the standing of the Rochester Company to maintain its suit in that case was clear and unquestioned, as the order “necessarily and immediately carried direction of obedience to previously formulated mandatory orders addressed generally to all carriers amenable to the Commission's authority.” Moreover, Mr. Justice Frankfurter, who wrote the opinion in that case, later pointed out (in his dissent in *Columbia System v. U. S.*, 316 U. S. 407, at page 436) that failure or refusal by Rochester to comply with the order would subject it to statutory penalties of \$500.00 for each offense and \$25.00 for each day of its continuance. The Rochester Company had a right to judicial review because it had a right not to be regulated if it was not within the class of telephone companies embraced within the Commission's authority, and it clearly had a right not to be subjected to the statutory penalties for refusal to obey the order if in making it the Commission had committed error of law in holding it subject to the regulatory provisions of the Act.

In striking contrast, the Commission here has merely held that the Rio Grande's evidence fails to prove that its rights under the Act are being violated, or that

all of the joint rates demanded by it are necessary "in the public interest". Judicial review is sought here because the Commission, without subjecting the Rio Grande to any loss, burden, regulatory process or statutory penalty, merely failed to order joint rates enabling it to reap all of the "pecuniary gain" it seeks by diverting to its line traffic to which the Rio Grande admits it has no legal right whatever.

The Rio Grande's lack of standing to maintain this suit is far clearer than that of the plaintiff railroads in *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 130 F. Supp. 76, affirmed Per Curiam, 76 S. Ct. 152. There the Commission's order authorized a merger of two large motor carriers. Fearing loss of traffic and revenues through stronger competition than they previously had from the motor carriers individually, the railroads sued to enjoin the order. In sustaining motions to dismiss the suit for lack of standing, the district court stated, page 78:

"In this case the Complaint fails to allege that the plaintiffs have suffered or been threatened with any damage or financial injury. It does not allege that any definite legal right of the plaintiffs has been violated, nor that the order of the Commission has created any additional motor carrier service, or increased competition for the plaintiffs. The plaintiffs merely allege that they are in competition with the motor carriers, and that they have a direct interest in the enforcement of the Interstate Commerce Act and the National Transportation Policy."

Distinguishing *Western Pacific v. South. Pac. Co.*, 284 U. S. 47; *Chicago Junction Case*, 264 U. S. 258; and *Alton R. Co. v. United States*, 315 U. S. 15, in which the orders affected legal rights or threatened material changes and disruptions in the transportation situation to the detri-

ment and loss of the plaintiffs, and citing *Singer & Sons v. Union Pacific R. Co.*, 311 U. S. 295; *Alabama Power Co. v. Ickes*, 302 U. S. 464, and *Tennessee Power Co. v. T. V. A.*, 306 U. S. 118, the district court held, page 79:

"Though the motor carriers in the instant case may, as a combination under joint control with adequate financial backing, offer stronger competition to the railroads than they did previously, we conclude that the railroads have no 'definite legal right' to be immune from this competition and, therefore, are not 'parties in interest' who may maintain this suit."

The Rio Grande contended in the district court that it has standing to maintain this suit as a party "adversely affected or aggrieved" within the meaning of Section 1009(a) of the Administrative Procedure Act, 5 U. S. Code § 1009. The court did not discuss the contention. The same contention was made in *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, *supra*, but the court rejected it, saying at page 78:

"Plaintiffs also refer to Section 10 of the Administrative Procedure Act, 5 U. S. C. A. § 1009, but it is clear that that Act merely was a declaration of existing law where judicial review is provided. See *Transamerica Corp. v. McCabe*, D. C., 80 F. Supp. 704.

"Thus the decisions under the Interstate Commerce Act must control the determination of whether the plaintiffs are 'parties in interest' within that Act."

Extensive search discloses no case holding that a party may maintain a suit under that Act or any other when, as in this case, the agency action grants a large part but fails to grant all of the demands for "pecuniary gain", and neither takes nor threatens to take anything from, or to change the position of the complainant.

The word "aggrieved" has been in legal use so long that its meaning could not innocently be misunderstood. Webster's New International Dictionary (1954) carries the following definition:

"Aggrieved—Troubled or distressed; having a grievance; specif. *Law*, adversely affected in respect of legal rights; suffering from an infringement or denial of legal rights."

The Attorney General's Manual, which is treated as authoritative on the purposes of the Administrative Procedure Act, clearly shows that no new rights to maintain suits to enjoin agency orders, and no enlargement of power of reviewing courts were conferred by that Act. Under the heading "Fundamental Concepts," the Manual states:

"a. *Basic Purposes of the Administrative Procedure Act*

"The Administrative Procedure Act may be said to have four basic purposes:

"1. To require agencies to keep the public currently informed of their organization, procedures and rules (sec. 3).

"2. To provide for public participation in the rule making process (sec. 4).

"3. To prescribe uniform standards for the conduct of formal rule making (sec. 4(b)) and adjudicatory proceedings (sec. 5), i. e., proceedings which are required by statute to be made on the record after opportunity for an agency hearing (secs. 7 and 8).

"4. To restate the law of judicial review (sec. 10).

11 The Manual further states, under the heading "Section 10(a)—Right of Review":

"Section 10(a) provides that 'Any person suffering legal wrong  
(Continued on next page)

The opinion of the district court completely fails to demonstrate that the Rio Grande has any standing to maintain suit in this case, and its judgment clearly should be reversed with direction to dismiss the suit.

(Continued from preceding page)

Because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.' This statement of the persons entitled to judicial review has occasioned considerable comment because of the use of the phrase 'any person suffering legal wrong.' This phrase was used as one of limitation and not for the purpose of making judicial review available to anyone adversely affected by governmental action. The delicate problem of the draftsmen was to identify in general terms the persons who are entitled to judicial review. As so used, 'legal wrong' means such wrong as particular statutes and the courts have recognized as constituting ground for judicial review. 'Adversely affected or aggrieved' has frequently been used in statutes to designate the persons who can obtain judicial review of administrative action. The determination of who is 'adversely affected or aggrieved \* \* \* within the meaning of any relevant statute' has been marked out largely by the gradual judicial process of inclusion and exclusion, aided at times by the courts' judgment as to the probable legislative intent derived from the spirit of the statutory scheme.' Final Report, p. 83; see also pp. 84-85. The Attorney General advised the Senate Committee on the Judiciary of his understanding that section 10(a) was a restatement of existing law. More specifically he indicated his understanding that section 10(a) preserved the rules developed by the courts in such cases as *Alabama Power Co. v. Ickes*, 302 U. S. 464 (1938); *Massachusetts v. Mellon*, 262 U. S. 447 (1923); *The Chicago Junction Case*, 264 U. S. 258 (1924); *Sprunt & Son v. U. S.*, 281 U. S. 249 (1930); *Perkins v. Lukens Steel Co.*, 310 U. S. 113 (1940); and *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U. S. 470 (1940). Sen. Rep. p. 44 (Sec. Doc. p. 230). This construction of section 10(a) was not questioned or contradicted in the legislative history. Also implied is the continuing role of the courts in determining, in the context of constitutional requirements and the particular statutory pattern, who is entitled to judicial review."

## III.

The Court Erred in Holding That the Commission's Finding That "there are at present no through routes, as that term is used in the Act, over the Rio Grande via Ogden or Salt Lake City on the traffic here concerned" is not Supported by Substantial Evidence and is Erroneous as a Matter of law, and the Court Further Erred in its own Holding That the Evidence Establishes the Existence of Such Through Routes.

The Rio Grande demanded an order from the Commission that would require joint rates via its line equal to the joint rates maintained over Union Pacific through routes between some 2,900 railroad stations in the northwest area and some 39,000 stations in that part of the United States lying generally east of a north and south line drawn along the eastern boundary of Colorado (R. 58-61). There are, of course, from one route to thousands of routes between each of the stations in the respective areas, but if there were only one through route between each of the stations, this would make a minimum total of 113,100,000 through routes between the stations in the respective areas.

As its demands would divert the traffic from Union Pacific routes and short haul them at least 925 miles, the Rio Grande sought to avoid the short-haul prohibition of Section 15(4) of the Act by claiming that through routes had existed for many years via its line for the traffic moving between stations in those areas, and contending before the Commission and the lower court either, (1) that its line is physically a part of all of the myriad of through routes now maintained via the Union Pacific between all stations in the respective areas, or, (2) that its line is a part of all routes formed by carriers whose lines connect

between all stations in the respective areas, and which carriers have published local rates between points on their respective lines.<sup>12</sup> So contending, the Rio Grande argued that the short-haul prohibition of Section 15(4) was not applicable and that the Commission should disregard the restrictions of that prohibition.

The Rio Grande undertook to prove its allegation that its line is a part of all these through routes by pointing to the fact that (1) it was a party to through routes and joint rates for traffic to and from the northwest between 1897 and 1912; (2) contending that cancellation of the joint rates did not cancel the through routes since interchange of the traffic with its line is physically

- 12 The colossal and fantastic extent and scope of the Rio Grande's claim that it is already a part of all through routes for the involved traffic, between the 2900 stations in the northwest and the 39,000 stations in the east is shown in an official Federal document entitled "Through Routes", being a transcript of hearings before the Interstate and Foreign Commerce Committee of the House of Representatives on Senate Bill 1261, December 1937 and April 1938, concerning a proposal of short line railroads and the Interstate Commerce Commission to repeal the short-haul prohibition of Section 15(4) of the Act. It is shown in that document (p. 164) that there were then 12,291 different through routes for movement of traffic under specific tariff publication from Chicago, Ill. to Jacksonville, Fla., and (p. 142) that there were more than 10,000 through routes for so-called merchandise traffic alone between New York, N. Y. and Dallas, Texas, and (p. 141) that there were 2,300 through routes from New York to St. Louis and 2,628 through routes from Boston to St. Louis, and from such smaller places as Butler, Pa. to Burlington, Ia., there were as many as 130 through routes, and from New York to Chicago 445 through routes. While that testimony concerned through routes east of the Missouri River, it illustrates the point we make, particularly since much of the transcontinental traffic here involved moves through such points as St. Louis, Kansas City, Omaha, Chicago, Pittsburgh, and other cities that are served by numerous railroads, nearly all of which doubtless are parties to the existing through routes of which the Rio Grande claims its line is a part, and it is indisputable that the number of such routes would run into many millions.

possible, and that counsel and a witness for Union Pacific "admitted" that the traffic could move via the Rio Grande if shippers wanted to pay the higher combination rates; (3) that 18 shipments of through traffic from 15 of the 39,000 stations in the east moved westbound via its line in 1948 at combination rates to 9 of the 2900 stations in the northwest area (I. C. C. Ex. 1, p. 5); that 37 carloads moved in 1948 from points on the Union Pacific in the northwest to destinations on the Rio Grande's line; (4) that through traffic was diverted to and moved over its line under emergency conditions of World War II and the blizzards which blocked the Union Pacific Railroad a few days in 1949.

After carefully analyzing the facts and circumstances upon which the Rio Grande relied to support its contention, and comparing them with those upon which this Court annulled the order in *Thompson v. United States*, 343 U. S. 549, and applying "the accepted tests for determining the existence of a through route" laid down in that decision<sup>13</sup> the Commission rejected the Rio

13 In the *Thompson* case this Court held at pages 557-558 that:

"In short, the test of the existence of a 'through route' is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.

"In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route, since the power to establish through routes under Section 15(3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines."

Grande's contention that the claimed through routes were already established via its line, and its answer to the contention is so clear and logical, and, we submit, so impeccably correct, we adopt it and here quote at some length from it (R. 61-65):

"As above stated and as testified by numerous shippers in this proceeding, the Ogden gateway routes are not considered as open or through routes commercially, but as routes that are closed to shippers because of the higher rates applicable. Plainly, a finding that such routes should be opened to shippers on a commercial basis by establishing competitive joint rates would result in the establishment of such routes as effective through routes, a character which they do not now possess.

"In *Thompson v. United States*, 343 U. S. 549, decided June 2, 1952, the Supreme Court considered the question of the contents of the term "through route" as used in the act; upon an appeal from a decision of a lower court sustaining our order in *Omaha Grain Exc. of Omaha, Nebr. v. Missouri Pac. R. Co.*, 278 I. C. C. 519. Therein, we had affirmed a prior finding of division 2 that a through route on grain from points on the Central branch of the Missouri Pacific Railroad Company in Kansas, Concordia and west thereof (Lenora, Kans., was used as a typical origin), to Omaha, Nebr., and Council Bluffs, Iowa, in connection with the line of the Chicago, Burlington & Quincy Railroad Company beyond Concordia, was already in existence and therefore did not have to be established preliminary to the exercise of our power to prescribe reasonable rates under sections 1 and 15 (1) of the act. The Court held:

"In short, the test of the existence of a "through route" is whether the participating carriers hold themselves out as offering through transportation service. Through carriage implies the existence of a through route whatever the form of the rates charged for the through service.

"In this case there is no evidence that any through transportation service has ever been offered from Lenora to Omaha via the Burlington. The carriers' course of business negatives the existence of any such through route. \* \* \* Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha \* \* \*. Since there is admittedly no evidence that the Missouri Pacific ever offered through transportation service over the route in question, the Commission's order is without evidentiary support under the accepted tests for determining the existence of a through route."

"The Court cited with approval *Beaman Elevator Co. v. Chicago & N. W. Ry. Co.*, 155 I. C. C. 313, wherein the Commission held that proof of one shipment on a through bill of lading over a particular route was not sufficient to show the existence of a through route, because, as stated by the Court, 'that one shipment was not representative of the carriers' course of business.' It thus becomes necessary to determine whether the carriers in this proceeding 'hold themselves out as offering through transportation service' from and to points here concerned via the Ogden gateway as indicated by their 'course of business' in respect to traffic over the routes in question."

"The evidence shows that 37 carload shipments were made in 1948, which may be accepted as a representative year, on through bills of lading from origins in Utah, Idaho, Oregon, and Washington to destinations on the Rio Grande in Utah and Colorado via Ogden or Salt Lake City. All of these shipments originated on the Union Pacific, except three which originated on its connections in Oregon or Washington. Twenty-three moved to Salt Lake City (via Ogden), Provo, Midvale, Murray, and Springville, Utah, and 14 to Denver, Louviers, Pueblo, and Trinidad, Colo., on the complainant's line from Denver to Trinidad. The commodities shipped were canned

goods, canned salmon, machinery, contractors' equipment, paper, bags, lumber, wallboard, flour, roofing, acid, newsprint, and sheep. The shipments of canned goods and canned salmon, 10 in number, were stopped at intermediate points on the Rio Grande for partial unloading. The 37 shipments moved from or to separate points, except that 2 carloads of canned salmon moved from Seattle, Wash., to Provo, 2 carloads of acid from Dupont, Wash., to Louviers, 2 carloads of canned goods from Logan, Utah, to Denver, 2 carloads of sheep from Bellevue, Idaho, to Pueblo, 3 carloads of lumber from McCall, Idaho, to Salt Lake City, 3 carloads of canned goods from Logan to Pueblo, and 6 carloads of lumber from Emmett, Idaho, to Midvale. No through shipments are shown to have moved from the northwest area over the Union Pacific and the Rio Grande via Ogden or Salt Lake City to any destination east of Colorado common points.

West-bound, in the same year, 18 carload shipments were made on through bills of lading from points in Illinois, Indiana, Michigan, Ohio, Pennsylvania, New Jersey, Arkansas, and Texas over connecting lines and the Rio Grande to Salt Lake City or Ogden and the Union Pacific beyond to destinations in Utah, Idaho, Montana, Oregon, and Washington. These shipments consisted of tractors, dessert preparations, furniture, canned goods, agricultural implements, soap, cattle, castings, feed, rubber, cottonseed hull brand, and tile. The shipments of tractors, dessert preparations, furniture, canned goods, agricultural implements, and feed were stopped at intermediate points on the Rio Grande or the Union Pacific, or both, for partial unloading. Two of the shipments destined to Idaho points were delivered at Salt Lake City and trucked to destination so as to avoid paying the applicable combination rates on Ogden.

"In that same year, 21 carload shipments moving on through bills of lading from various origins east

of the Rocky Mountains to destinations in Idaho, Oregon, and Washington, which were routed over the Rio Grande and the Union Pacific, were held by the Rio Grande at Denver or Pueblo for correction of the routing because the joint through rates were not applicable over that road via the Ogden gateway. Under service orders issued by us during and subsequent to World War II, a substantial number of shipments were diverted from the regularly used routes to the routes here sought to be opened commercially. For example, in February 1949, when the main line of the Union Pacific in Wyoming was blocked by snowstorms, the traffic was diverted to the route of the Rio Grande between Denver and junctions with the Union Pacific in Utah. During World War II, special combination trains of troops in passenger cars and of military supplies in freight cars from eastern and southern origins to destinations in the northwest area were initially routed and moved over the Rio Grande via Ogden and the Union Pacific. The rates and charges for these freight movements were not filed with us and were adjusted, under the authority of section 22 of the act, on the basis of the joint rates applicable over the Union Pacific routes through Wyoming. These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not those routes constitute 'through routes' within the meaning of that term as used in the act.

"So far as appears, the routes used, or attempted to be used, for the foregoing shipments were those specified by the shippers. There is no indication that any of the defendants has ever solicited any traffic from and to the areas here concerned for routing over a Rio Grande route by which a higher combination rate applied, or has ever used such a Rio Grande route except where called upon to do so by routing specified by the shipper or by a prior con-

necting carrier. In other words, so far as this record shows, 'the carriers' course of business' has been and is to use the Union Pacific routes except where called upon to use the Rio Grande routes by force of shippers' or connecting carriers' routing. The whole course of conduct of the Union Pacific, so far as revealed, has been for many years and is now to guard jealously its long haul and not open commercially the Rio Grande routes on this traffic. That this policy has been maintained is amply demonstrated by the fact that in a representative year, as stated, only 37 carloads east-bound, none to destinations east of Colorado common points, and 18 carloads west-bound moved over Rio Grande routes via Ogden or Salt Lake City, as compared with many thousands in both directions in the same year from and to the same points at the joint rates over the Union Pacific routes, the details of which appear later in this report.

"Thus, all of the foregoing shipments made over the Rio Grande routes must be regarded as of an isolated nature and as falling in the same category as the shipment held insufficient to show the existence of a through route in *Beaman Elevator Co. v. Chicago & N. W. Ry. Co.*, *supra*, cited with approval by the Supreme Court in *Thompson v. United States*, *supra*. Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by the Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc., v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States*, *supra*. (Italics added.)

"We find that there are at present no through routes, as that term is used in the act, over the Rio Grande via Ogden or Salt Lake City on the traffic."

[“except on east-bound shipments of sheep or goats, to which reference is made later in this report.] here concerned, and that any order requiring the establishment of such routes, and joint rates over them, must be grounded upon findings, as specified in section 15, that the routes sought are necessary or desirable in the public interest, and are needed in order to provide adequate, and more efficient or more economic transportation.”

Refusing to adopt or apply the tests laid down in the *Thompson* case, but upon the same facts and circumstances analyzed by the Commission, the district court adopted the opposite conclusion, reversed the Commission's finding that there are no through routes, within the meaning of the Act, over the Rio Grande for the traffic here concerned, and held (R. 292):

“In our view, the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond.”

The court's opinion does not indicate what through routes, or between what points or termini, or the commodities for which, or the railroads that comprise the through routes it holds to be in “existence”. This lack of specificity would render it impossible to give any practical effect to the court's decision, for no one can determine from the opinion what routes are in “existence” or on what commodities.

Although the court readily assumed authority to reverse the Commission and to hold that the “uncontradicted evidence” showing that one through or “bridge” shipment moved via the Rio Grande from each of 15 eastern points in 1948 to 9 points in the northwest “clearly

established the existence of through routes" via the Rio Grande, the court is inconsistent, if not self-contradictory, in refusing to decide, but instead, remanding the case for the Commission to decide whether the "uncontradicted evidence" on which it unhesitatingly reversed the Commission is sufficient to prove the existence of through routes via the Rio Grande between each of the 2900 points in the Northwest and the 39,000 points in the east (R. 292). If, upon such remand, the Commission is bound by the court's holding that through routes via the Rio Grande are already in "existence", it will be unable to determine from the opinion what through routes are embraced in the court's holding, and yet will be under the court's direction to decide whether the "uncontradicted evidence" establishes the existence of through routes via the Rio Grande between all of the 2900 points in the northwest and all of the 39,000 points in the east. And this in the face of the Commission's finding already made upon the same "uncontradicted evidence" that there are no through routes via the Rio Grande for the traffic concerned.

As the opinion below merely "summarized" the evidence and arguments on which the Rio Grande relied, but refrained from disclosing the rationale, if any, by which the court reached the conclusion that through routes claimed by the Rio Grande already exist, we are left to guess or speculate upon the facts or circumstances on which it may be assumed that the court relied.

1. If the court believed through routes via the Rio Grande now exist because some of the routes did exist from 1897 to 1912, and because, when the joint rates were cancelled "the through routes were not closed", then its discussion concerning movement of traffic over the Rio Grande at combination rates is unnecessary and ir-

relevant. But, unless the court intended to hold that, in order to close through routes, railroads must erect some physical roadblock or take other measures to prevent physical interchange of traffic, then those old through routes were "closed" with the cancellation of the joint rates. Indeed, the district court itself held (R. 285) that:

"The higher rates effectually close the Ogden gateway commercially and enable the Union Pacific to obtain the long haul on such traffic."

Although most of the through routes and joint rates established in connection with the Rio Grande during the court receiverships had been cancelled by 1912 without protest or proceedings before the Commission, some of them were not cancelled until 1914. In several cases the Commission suspended tariffs filed by the Union Pacific proposing to "close" certain through routes and cancel joint rates over them. Protests against the proposals resulted in hearings and formal reports by the Commission, in which it stated that the Union Pacific's purpose in cancelling the joint rates and closing the routes was to obtain a "longer haul" on the traffic.

In *Lumber Rates, Oregon and Washington to Eastern Points*, 29 I. C. C. 609, the Union Pacific filed tariffs proposing "to close established routes for certain traffic." The Commission permitted the cancellation of the Wallula, Washington, gateway and "the closing" of routes with the Northern Pacific through that gateway (p. 612), but it held that "closing of the Spokane, Silver Bow and Butte gateways" on lumber and that "cancellation of through routes and joint rates by way of the Colorado gateway" upon general traffic was not justified. With respect to the latter the Commission stated at page 614

that the proposed tariffs would result in "cancelling through routes and joint rates by way of the Colorado Gateways" on all traffic both eastbound and westbound originating and terminating at points on the Oregon-Washington Railroad and Navigation Company (a part of the Union Pacific system) in the State of Washington. However, in a supplemental report in the same proceeding, upon Union Pacific agreement to retain through routes and joint rates on fruit and lumber, the Commission permitted the Union Pacific "to close the Colorado gateways for general traffic between exclusive points of that system in the States of Oregon and Washington and points on and east of the Missouri River" (31 I. C. C. 191).

In *The Ogden Gateway Case*, 35 I. C. C. 131, the Commission permitted the "cancellation by the Union Pacific of through routes and joint fares in connection with The Denver and Rio Grande through the Ogden gateway", although in doing so it stated that passengers could, of course, still use the Rio Grande route for through service by paying "the higher charges resulting from application of the intermediate fares". The Commission said (page 132) that publication of the tariffs brought "vigorous protests" from the Rio Grande, the railroad commissions of Idaho and Montana, and communities located on the Rio Grande in Colorado and Utah.

In *United States v. U. P. R. R. Co.*, 28 I. C. C. 518 (decided December 1, 1913, after most of the through routes and joint rates in connection with the Rio Grande had been cancelled in 1906 and 1912), the Commission refused the request of the United States Government to order "establishment of through routes and joint rates" in connection with the Rio Grande at Pueblo or Denver

and at Salt Lake City or Ogden, Utah, on traffic between the same northwest area and points east of Denver that is involved in the instant case. Pointing out that Union Pacific routes were materially shorter than routes demanded by the Government via the Rio Grande, the Commission said at page 524, "we are unable to find on this record any set of facts which would over-shadow the clearly expressed purpose of the Act" to prohibit short-hauling Union Pacific routes by "the establishment of the desired routes" via the Rio Grande.

From the foregoing, it is indisputable that the Commission and everyone concerned regarded the action of the Union Pacific as "closing" the through routes and gateways in connection with the Rio Grande as well as the cancellation of the joint rates even though interchange of traffic between the two railroads was still physically possible and shippers could use the Rio Grande route by paying higher combination of local rates. Contrary to the view of the district court that "the through routes were not closed" by cancellation of the joint rates, the proceedings before the Commission clearly demonstrate that the court now attempts to reverse Commission decisions made nearly 50 years ago on the question whether its approval of tariffs proposing to cancel "through routes and joint rates" effected the closing of the through routes as well as the cancellation of the joint rates.

The filing of the tariffs constituted notice to the public that carriers participating in Union Pacific routes no longer "hold themselves out" as offering through service in connection with the Rio Grande, and that their "course of business" thereafter would be to refuse to relinquish their long hauls on the traffic from and to the northwest area, *Thompson case, supra*, page 557.

This Court has long since recognized the efficacy of tariff publication in cancelling or closing gateways and through routes. *Atlantic Coast Line R. Co. v. U. S.*, 284 U. S. 288; *A. T. & S. F. Ry. v. United States*, 279 U. S. 768, 775; *Kansas City So. Ry. v. Albers Comm. Co.*, 223 U. S. 573, 596. The Commission also gives appropriate effect to the publication of tariff changes as a means of closing a through route. In *Steinmetz v. Atchison, T. & S. F. Ry. Co.*, 293 I. C. C. 202, a shipper had routed a shipment of cattle from Montana to Kansas via a route over which there were no joint rates. In dismissing a complaint for reparation, the Commission cited this Court's decision in the *Thompson* case, *supra*, and held:

"Therein the Supreme Court makes plain that a route such as that used for the instant shipment may not be regarded as a through route under section 15(4) of the Interstate Commerce Act. Thus, the route used by this shipment was a 'closed' route, and the complainant was apprised of that fact by the publication of the joint through rate from and to these points for application over routes other than that used. This does not mean that a shipper may not specify routing for a shipment over such a 'closed' route and expect compliance with the routing thus specified, but it does mean that when such routing is specified and complied with, the carriers concerned have a right to charge a combination rate, provided that each of the factors in such combination does not exceed a maximum reasonable rate for a shipment having origin and destination at the points from and to which such rate applies." (pages 203-204)

As alleged in its complaint to the Commission, cancellation of the joint rates so effectively closed the through route via the Rio Grande "as to prevent the movement of freight traffic" over its line; and to deprive the Rio

Grande of "through freight traffic which it might obtain if equal rates applied in connection with it" (V. I, 7, 8).\*

So effective was the cancellation of the joint rates in closing the through routes via the Rio Grande that its brief (p. 5) to the Commission argued that refusal of carriers participating in the Union Pacific routes to short haul themselves by including the Rio Grande in the through routes at equal joint rates "actually prevents the movement of traffic from eastern points" via the Rio Grande to Salt Lake City and Ogden; and (p. 98) that the higher combination of local rates, after cancellation of the joint rates, via its line "prevent any regular or substantial movement of the traffic via" the Rio Grande; and again at page 101 of its brief that, "unless the same level of rates is prescribed on the traffic involved via the Ogden Gateway and the Rio Grande no practical or useful purpose will be served"; and (p. 116) that livestock shippers testified that any rates via the Rio Grande higher than livestock rates via Union Pacific routes "would be of no use to them and would not move the livestock" via the Rio Grande.

Admittedly, cancellation of the joint rates was effective to close the through route via the Rio Grande sufficiently to preserve the right guaranteed by Section 15(4) of carriers participating in Union Pacific routes not to be short hauled by the Rio Grande. Indeed, if cancellation of the joint rates had not effectively closed the route via its line, then the Rio Grande would have had no motive in complaining to the Commission or to the court. The Rio Grande clearly stultifies its position in contend-

\* Because of duplication in page numbering the printed records in these cases, this abbreviation will be used to refer to pages of Volumes I and H, proceedings before the Interstate Commerce Commission.

ing that cancellation of the joint rates had no effect on the existence of through routes via its line and, in the same breath, contending that cancellation of the joint rates so effectively closed its route "as to prevent the movement of freight traffic" over its line, and the lower court's opinion is likewise inconsistent and erroneous.

That the cancellation nearly 50 years ago of the joint rates established in connection with the Rio Grande by the receivership courts in 1897 fully accomplished the "closing" of the through routes in question, is and has been the understanding of all railroads and shippers generally concerned during that 50-year period. It was the understanding of 137 shipper and public witnesses who opposed the Rio Grande and of some 50 witnesses who supported its complaint before the Commission, and it was the understanding of the Rio Grande's President, who testified that, ever since he became affiliated with the Rio Grande he had looked forward "to the opening of the Ogden Gateway." It was the tacitly admitted position of Rio Grande until after this Court handed down its decision in the *Thompson* case (June 2, 1952). In its publicity campaign, conducted before and after the filing of its complaint, August 1, 1949, the Rio Grande publicly asserted that its purpose was to "restore" to the northwest the "rates and routes" established by the receivership courts in 1897. As a part of its publicity campaign, the Rio Grande printed and widely distributed a pamphlet entitled "20 Questions—An Informative Quiz", (I. C. C. Ex. 30), in which it posed 20 questions and answered them with the arguments it thought would convince shippers to aid it in its efforts to "open" through routes via its line in connection with the Union Pacific to and from the northwest area. Those questions clearly and indisputably show that the Rio Grande itself con-

sidered the prior through routes via its line "closed" by the cancellation of the joint rates by the Union Pacific.<sup>14</sup>

2. If the lower court relied on the statements of the counsel and witness for the Union Pacific (R. 288), that shippers may route such of the involved traffic over the Rio Grande as they desire if they are willing to pay the higher combination rates, the court is clearly erroneous in holding that this obvious fact tends to prove the existence of through routes via the Rio Grande unless the court intends to rest its decision on a theory that this Court flatly rejected in the *Thompson* case, because such a theory would mean that "through routes exist between all points throughout the country wherever physical rail connections are available" (p. 559). The court further errs in holding that a shipper's right under Section 15(8) of the Act to route his traffic "exists only when through routes and through rates have been established"; for there is no provision in the Act preventing a shipper from routing his traffic over any series of connecting railroads

14 Among the 20 questions were the following:

- " 2 What is Meant by the 'Closed' Gateway at Ogden?"
- " 3 What is the Effect of the Closed Gateway?"
- " 4 How does the Rio Grande Seek to Open the Ogden Gateway?"
- " 5 How Will the Rio Grande Benefit from Opening of the Ogden Gateway?"
- " 6 Why Does the Union Pacific Oppose Opening of the Ogden Gateway?"
- " 7 Will the Open Ogden Gateway Reduce Freight Rates?"
- " 8 Will the Open Gateway Provide Improved Service?"
- " 9 With Opening of the Gateway, Will There be More Freight Cars Available for Northwest Shippers?"
- "11 Will an Open Gateway at Ogden Benefit Colorado and Utah?"
- "12 Will an Open Gateway at Ogden Benefit Shippers Outside of Union Pacific or Rio Grande Territory?"
- "13 Will Opening of the Ogden Gateway Reduce Railroad Employment in the Closed-Door Territory?"
- "14 Will the Opening of the Ogden Gateway Reduce Taxes Paid in the Closed-Door Territory?"

wherever physical interchange is possible and the carriers have performed their duty of publishing local rates on their respective lines. The right of a shipper under Section 15(8) is to choose between two or more "competing lines of railroad" and he may exercise that right by paying the rates published over the route or routes he chooses, regardless of whether the rates are combinations of local rates or joint rates.

3. If the court relied on the fact that joint rates are published for shipments of sheep and goats via the Rio Grande, the court clearly errs because there is no statutory, judicial or administrative precedent or authority for the proposition that where carriers publish a through route with joint rates for one commodity, then such route becomes a through route within the meaning of Section 15(3) and (4) for every commodity. Such proposition is contrary to the Commission's settled administrative practice and treatment of through routes and carriers' rights under Section 15(4) not to be short hauled. See *Adrian Grain Co. v. Ann Arbor R. Co.*, 276 I. C. C. 331.

4. If the lower court intended to hold that the existence of through routes can be established by proof of "a continuous use of the Rio Grande in the movement of traffic to and from the closed door area at through combination rates", then its ultimate conclusion is wholly erroneous and unsupported because the evidence here is limited to 18 westbound through shipments that moved in 1948; to 37 eastbound shipments that moved to local destinations on the Rio Grande in 1948, none of which moved beyond its eastern termini; and to traffic that was diverted to the Rio Grande under war and blizzard emergency conditions, which is clearly within the right of carriers to do by voluntary agreement or, which, in the absence of such agreement, the Commission may require under Section 15(4) of the Act. The court further errs in

saying that movements of the traffic via the Rio Grande "was substantially the same in years prior to 1948 and continued into 1949" for that statement is squarely contrary to the Rio Grande's own assertion at page 98 of its brief to the Commission that the combination rates are so high as to "prevent any regular or substantial movement of the traffic" via its line; and there is no evidence whatever in the record concerning the movement of such traffic via the Rio Grande during any year other than 1948. The Rio Grande's witness who submitted the movement for 1948 did not say that 1948 was a representative year, but that he selected that year because "it was the last full calendar year prior to this proceeding" and, after testifying concerning problems of re-routing arising because shippers had sometimes mis-routed their traffic via the Rio Grande, in ignorance of the fact that the joint rates did not apply via that line, the witness said "the same problems prevailed to about the same extent in prior years, and have continued thus far in 1949" (V. I, 76).

The *Thompson* decision, page 557, footnote 13, makes it plain enough that even if the Rio Grande had proved that one or more isolated or sporadic shipments moved via its lines over each of the innumerable routes of which it claims to be a part, it still would have failed to prove "the carriers' course of business". *A fortiori*, its showing here of 18 shipments routed via its line by shippers over 18 of the millions of existing through routes between the 39,000 railroad stations in the east and south and the 2,900 stations in the northwest area is not even a *scintilla* of proof that the "course of business" of the carriers comprising the myriad of Union Pacific routes is to offer through transportation service in connection

with the Rio Grande between the northwest and the eastern and southern parts of the country.<sup>15</sup>

The "continuous use" theory advanced by the lower court not only lacks any factual basis, but is directly contrary to the testimony of the Rio Grande's own President, who said (V. 1, 42):

"The Dotsero Cutoff had just been completed when I began my tenure as co-trustee of the Rio Grande. While this 'cutoff' provided a *potential* means for the Rio Grande to participate in trans-continental traffic, the physical condition of our company at that time was such that *we were in no position to effectively compete for this extremely competitive business from either a service or cost standpoint*. Because of long depressed earnings, the Rio Grande's trackage and rolling stock were in very poor condition. At that time *faster schedules were neither feasible nor possible*. (Italics added.)

"Therefore, a planned program was immediately progressed with a view towards contributing to a sounder national transportation system by making the Rio Grande a vital link in transcontinental traffic. This embraced strengthening of the personnel, a revamping of the financial structure, and complete modernization of the physical plant."

5. The lower court's statement that shipments diverted from the Union Pacific via the Rio Grande under emergency conditions without the Union Pacific having

15 At page 559, the *Thompson* decision holds:

"Through service to points short of Omaha cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, *a right guaranteed by Section 15(4)*. We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern." (Italics added.)

asked the Commission to authorize temporary through routes via the Rio Grande and without the Commission invoking its authority under Section 15(4) to establish temporary through routes though "admittedly do not tend to establish an ordinary course of business", but do indicate "that both the Union Pacific and the Commission assumed the existence of through routes" (R. 289) via the Rio Grande, is untenable and illogical, and rests upon a misconception or a distortion of the statutory pattern. Section 1(15) of the Act authorizes the Commission to issue "service orders" whenever it is "of opinion that shortage of equipment, congestion of traffic, or other emergency requiring immediate action exists in any section of the country" and Section 15(4) authorizes the Commission, under the same type of emergency conditions, to "establish temporarily such through routes as in its opinion are necessary or desirable in the public interest". But no provision of the Act prohibits carriers from acting voluntarily among themselves in such emergencies without invoking the authority of the Commission under either of these statutory provisions and it is wholly illogical and erroneous to hold that, because the Union Pacific and the Rio Grande acted voluntarily in these emergencies, instead of invoking or waiting for an exercise of the Commission's emergency powers on its own initiative, indicates or suggests that the Union Pacific and the Commission assumed that through routes via the Rio Grande were already in existence, within the meaning of Section 15(3) and (4), for the traffic involved in this suit. It was testified by an experienced railroad witness in this case (V. I. 583) that:

"There is nothing unusual about such diversion of traffic among railroads under emergency conditions. It is the rule and not the exception."

"Detour movements of trains and traffic via other lines in the event of interruptions is an accepted principle in American railroading, and hundreds of agreements are on file today stipulating the terms and conditions governing such movements. It is the device under which traffic of the Nation is kept fluid regardless of the temporary stoppage or incapacity of one line to function."

As well stated by the Commission in holding that these few isolated shipments do not prove the "carriers' course of business", but rather the exception to it, and are clearly insufficient to show the existence of a through route:

"Any other holding would constitute an open invitation to any shipper to set aside the provisions of section 15(3) and (4) of the act simply by preliminarily making a shipment or two over the route sought to be opened commercially, a result plainly not intended by Congress, as evidenced by the amendments to section 15(4) made in 1940 (see *D. A. Stickell & Sons, Inc. v. Alton R. Co.*, 255 I. C. C. 333, 339), and a result clearly not in accord with the decision in *Thompson v. United States*, *supra*." (R. 65)

And, as to the emergency movements:

"These movements, as well as those under service orders, were made under emergency conditions and not in the ordinary course of the carriers' business. They show only that the Rio Grande routes were physically practicable, and have no bearing upon the issue of whether or not these routes constitute 'through routes' within the meaning of that term as used in the act." (R. 64)

6. The district court said the Union Pacific and other participating railroads "have issued through bills of lading, thereby recognizing the through route status" of the Rio Grande. Although the court did not indicate

what more, in addition to cancellation of the joint rates, the Union Pacific could or should have done to "close" the through routes via the Rio Grande, the latter asserted in the district court that through routes can be closed "legally and factually by simply publishing in their tariffs that particular railroads will not thereafter issue a bill of lading or accept shipments which are routed by shippers via such routes". This is but to say that, in order to close an existing through route, a carrier must go so far as to commit a direct violation of Section 20(11) of the Act; which provides:

"That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation \* \* \* shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof \* \* \*"

Thus, the lower court would leave the Union Pacific or any other railroad in the perilous, illogical and untenable position of either losing its "right guaranteed by Section 15(4)" to its long haul, *Thompson case, supra*, page 559, or violating its plain statutory duty to accept property tendered for shipment and issue a "bill of lading therefor". The court's view that the Union Pacific could protect itself against being short hauled by the simple expedient of refusing to accept and issue a bill of lading for property tendered for shipment is directly contrary to the holding of this Court in *Southern Ry. Co. v. Reid*, 222 U. S. 424, 435, that "it is undoubtedly the duty of a railway company to receive freight when tendered for transportation". In *N. Y. Central R. Co. v. The Talisman*, 288 U. S. 239, this Court rejected the contention that a railroad could "by its own act relieve itself of any duty imposed upon it by law or arising out of the nature of its undertaking" as a public servant, and held that a railroad is "powerless by mere announcement to fix the terms

on which it would participate" in effecting interchange of traffic with other carriers (p. 242). Citing numerous cases, the Court said at page 241:

"Petitioner and respondent were connecting carriers. As such, each, in the discharge of its duties to the public, owed to shippers of freight in its possession destined to points on or routed over the railway of the other the duty to deliver to the connecting line for further transportation; and each was correspondingly bound to receive and carry."

The assertion that a carrier must violate its plain duty under one provision of the Act in order to retain the benefit of its rights under another provision of the same Act is wholly untenable. See *Atchison & Topeka Ry. v. Harold*, 241 U. S. 371, 378; *Norfolk & W. Ry. Co. v. Dixie Tobacco Co.*, 228 U. S. 593, 595.

7. The lower court's opinion states that "a joint rate is not essential to the existence of a through route" and that "the rate which applies over a through route may be the aggregate of separate rates fixed independently by the several carriers participating in the through route." The opinion then cites *St. Louis S. W. Ry. Co. v. United States*, 245 U. S. 136, 139, which defines the term "through route", and *Thompson v. United States*, *supra*, quoting from the latter decision the definition of a "through route" as there given at page 556.

The opinion refrains from indicating what there is in the definitions of a through route in the *St. Louis* case and the *Thompson* case that "compels us to conclude that the through routes contended for by Rio Grande were in existence", so we are again left to guess what the Court means in this part of its opinion. The decision in the *St. Louis* case clearly is against the lower court's conclu-

sion and the Rio Grande's position here, as shown at page 143:

"The order entered does not require any complaining carriers to substitute the route via Memphis for that via Cairo; nor does it require any to establish an additional route via Memphis. Carriers are left free to furnish the through transportation either via Cairo or via Memphis. The order merely compels a through route and a joint rate of 16 cents to Paducah. If they elect to continue the existing through route via Cairo, the order operates merely to introduce reduced joint rates. If they elect to discontinue the through routes via Cairo, the order operates to establish through routes and joint rates via Memphis, which the findings of the Commission fully justify."

In the instant case the Rio Grande's sole purpose is to "substitute" its line for lines of the Union Pacific and other roads so it can haul the traffic part way as a "bridge" line.

If the lower court means that the part of the definition in the *Thompson* case that "compels" the conclusion that through routes exist via the Rio Grande is that part which says that a through route may exist where a "through rate" has been published and that such rate "may be merely an aggregate of separate rates fixed independently by the several carriers forming the 'through route'", then the court's conclusion that the definition compels it to hold that through routes exist via the Rio Grande is clearly erroneous because it flies in the face of the fact that this very theory was urged by the Commission but flatly rejected by this Court in the *Thompson* case in the following language (p. 558):

"The fact that appellant's line connects with the Burlington at Concordia does not aid the Commission in proving the existence of a through route since

the power to establish through routes under Sections 15(3) and (4) also presupposes such physical connection. And the showing that appellant publishes a local rate from Lenora to Concordia and that the Burlington publishes a local rate from Concordia to Omaha proves only that each carrier complies with the statutory duty to publish rates for transportation service between points on its own lines."

And, at pages 559-560, the Court further explained that:

"The Commission continues to support its order, but the logical conclusion of the theory advanced by the Commission is that through routes exist between all points throughout the country wherever physical rail connections are available. If there is no through carriage over any combination of connecting carriers, the Commission under its present theory would never have to establish through routes under Section 15(3) and (4) but could divert traffic to any route between two points by ordering reduction of the sum of the local rates over that route. Acceptance of this argument would mean that Congress' insistence on protecting carriers from being required to short haul themselves could be evaded whenever the Commission chose to alter the form of its order. The Commission, by using the form of order employed in this case, could also divert traffic from existing through routes to the lines of a weak carrier solely to assist that carrier to meet its financial needs, thereby evading completely the applicable prohibition of Section 15(4), before the Court in *United States v. Great Northern R. Co.*, 343 U. S. 562 (decided this day). In short, acceptance of the Commission's argument would mean that the acts of Congress since 1906 granting the Commission only a carefully restricted power to establish through routes have been unnecessary surplusage."

If the lower court's view is that through routes claimed by the Rio Grande exist on the theory that by

publishing their own independent local rates the connecting carriers "hold themselves out as offering through transportation service" via the Rio Grande, then again, its conclusion is clearly erroneous and foreclosed by the language just quoted from the *Thompson case*.

8. If the lower court rests its decision that through routes are in existence as claimed by the Rio Grande, upon that part of the definition in the *Thompson case* which says that "through carriage implies the existence of a through route whatever the form of the rates charged for the through service", then there is no basis whatever for the court's conclusion here, because there is no evidence whatever in this case, and indeed the Rio Grande made no effort to prove, and does not contend that there has been "through carriage" via its line between the termini of the millions of transcontinental routes, of which it claims to be a part. The complete absence of any such evidence becomes more fatal to the lower court's conclusion in view of its apparent reliance upon the fact that in the *Thompson case* there was no evidence showing that any shipment had ever moved from Lenora to Omaha via the Burlington, and in view of this Court's holding that the evidence upon which the Commission relied of shipments moving from Lenora to points on the Burlington short of Omaha:

"\* \* \* cannot be used as evidence of the existence of a through route to Omaha unless we are to hold that compliance with Section 1(4) causes the Missouri Pacific to lose its right to serve Omaha via its own lines, a right guaranteed by Section 15(4). We reject the Commission's argument that the existence of through routes from Lenora to points on the Burlington line short of Omaha proves the existence of a through route to Omaha via the Burlington as requiring an unwarranted distortion of the statutory pattern." (p. 559)

9. If, as the lower court erroneously seems to hold, that under the *Thompson* decision the existence of a through route can be proved by evidence showing actual movement of traffic over the entire lines of the connecting carriers "between the termini" (Section 15(4)) of the claimed through route, then the court is clearly wrong in holding that the meager token of evidence offered by the Rio Grande and summarized in the opinion, establishes the Rio Grande's claim that its line is a part of the millions of Union Pacific routes published in the tariffs for the transcontinental traffic involved in this case.

The lower court is further inconsistent and erroneous in attempting to throw back to the Commission for decision the question whether the "burden is on the Rio Grande to show some actual movement of traffic on through billing over each of the possible routes between the thousands of stations in the involved areas", for the court readily assumed authority to make its own decision and to reverse the Commission upon the very facts and circumstances on which the Commission held that through routes via the Rio Grande did not exist. If the court correctly construed the *Thompson* decision as holding that proof of actual movement "between the termini" of a claimed through route is essential to establish the existence of the route, then the court was bound by that decision to hold that the burden is on the Rio Grande to make such proof of the "carriers' course of business" by showing actual movement over each of the millions of routes of which it claims to be a part, and having failed to do so it had not proved the existence of the claimed through routes.

The lower court's citation of *Virginian Ry. v. United States*, 272 U. S. 658, lends no support to its views for no

question of actual movement of traffic was raised in that case, and the dictum of that decision that there were "through routes by combination" rates, has necessarily been overruled by the very pointed decision in the *Thompson* case, page 558.

The opinion below says it appears that the Commission "reasoned" that cancellation of the joint rates in 1906 and 1912 closed the through routes in a "commercial sense" by applying the higher combination rates and that this "terminated the through routes", but that "it was held to the contrary" in the *Virginian* case. But it was not there "held to the contrary" for that case could not have involved cancellation of previous joint rates because this Court said "these two carriers have not established any joint rates to the west" (p. 661).

Moreover, in footnote 18 at page 560 of the *Thompson* case, this Court says that the *Virginian* case "is inapposite", and it is clearly inapposite here, for the opinion in that case states at page 666 that "the order here in question was not sought or made under § 15(3) and does not direct the establishment of through routes and joint rates". Instead, as stated at page 662, the Commission ordered the carriers to "cease and desist" from collecting rates from the 54 complaining mines to western destinations in excess of the rates enjoyed by the 45 mines and others in the district having the lower rates. Thus, neither the Commission nor the Court in the *Virginian* case faced any problem of establishing joint rates under Section 15(3) or any new through route with joint rates. In that case, there was no railroad claiming that its line was a part of millions of existing through routes, nor any demand, such as the Rio Grande makes here, that the Commission require that the joint rates via existing Union Pacific routes be made applicable via the Rio

Grande for the purpose of its "pecuniary gain" from a "bridge" haul over its line of traffic diverted from existing routes. Furthermore, there was no question of short-hauling the Virginian in that case for the traffic involved was originated at the 54 mines located on its line and it hauled the coal from the mines to its junction with the Chesapeake and Ohio.<sup>16</sup> And, as the Virginian's line did not extend farther west, it had obtained its long haul on the westbound traffic there involved.

If the lower court had accepted and applied, as did the Commission, the "test of the existence" of a through route, namely, whether the participating carriers "hold themselves out as offering through transportation service" and "the carriers' course of business", as laid down in the *Thompson* case, page 557, it could have reached no other conclusion than that through routes and joint rates via the Rio Grande do not presently exist for the traffic concerned and it clearly erred in failing to do so.

16 That haul averaged only 64.7 miles, as shown in Commissioner Cox's dissenting opinion, 98 I. C. C. 498, and included all of the Virginian's line "which lies between the termini" of the route over which the coal moved from the 54 mines to the western destinations and, since it obtained its longest possible haul on such coal to the west, there was no short-hauling within the meaning of Section 15(4). As shown in the decisions of the Commission and this Court, the western terminus of the Virginian was at Deepwater, W. Va., and from there it "extends only eastward to tidewater", meaning Norfolk, Va., and other ports along the Atlantic Coast. The Virginian's purpose in refusing to reduce its local rates from the 54 mines to junctions with the Chesapeake and Ohio was to discourage shipments from those mines to the west and thereby retain or increase the volume of coal traffic over its line to the east which gave it the benefit of a maximum haul of 450 miles (98 I. C. C. 498).

**The Fallaciousness of the Lower Court's Decision That Through Routes are Already in Existence via the Rio Grande for the Traffic Concerned is Sharply Illustrated and Emphasized by the Situation With Respect to the Great Northern, Northern Pacific and Milwaukee Railroads.**

The Rio Grande's complaint to the Commission demanded that it order "joint through rates" equal to those maintained by the defendants therein named on traffic "between points on or via the Union Pacific in Utah north of Ogden, Idaho, Montana, Oregon, Washington and British Columbia and Colorado common points and points east thereof" (V. 1, 9). It further alleged that through routes now exist and have for many years existed for the interchange of traffic between those points with the Union Pacific at Ogden and certain other carriers at Denver and other Colorado points. In other words it claimed that through routes were already in existence between all points as to which it demanded prescription of joint rates, or as stated by the lower court, "that the routes over which joint rates are sought were in existence and open to traffic at combination rates" (R. 286). This, of course, included all points located on the Union Pacific and all points located on other railroads with which the Union Pacific has joint rates in Idaho, Montana, Oregon, Washington and British Columbia and all points on the hundreds of railroads with which the Union Pacific has joint rates to the thousands of points east of Colorado common points and the Missouri River.

The principal lines with which the Union Pacific has joint rates for interchange of traffic at junctions in Idaho, Montana, Oregon and Washington are the Great Northern, Northern Pacific and the Milwaukee Railroads. Neither of these lines connects with the Rio Grande and,

indeed, their lines are located and traverse territory several hundred miles distant from Ogden, the northernmost point reached by the Rio Grande. For example, Spokane, Washington, where the Great Northern interchanges traffic with the Union Pacific, is 859 miles from the Rio Grande's nearest trackage at Ogden.

At one place in its opinion the lower court concludes that "under the evidence before the Commission the existence of through routes via the Rio Grande was clearly established, as a matter of law"; thus, apparently, agreeing with and adopting the Rio Grande's contention that through routes via its line were in existence between points in the northwest area located not only on the Union Pacific but also points located on the Great Northern, Northern Pacific and Milwaukee with which the Union Pacific has joint rates for interchange of part of the traffic the Rio Grande seeks. But at another place in its opinion the lower court refuses to say whether it intends to hold that through routes via the Rio Grande exist between each of the 39,000 stations in the area east of Colorado and the 2,900 stations in the northwest area and, though refusing to indicate or specify what through routes over the lines of what carriers, between what points or termini or on what commodities, are in existence via the Rio Grande. However, in the following statement (R. 292) the court seems to narrow its decision as to through routes to and from points on the Union Pacific in the northwest area:

"In our view the uncontradicted evidence clearly established the existence of through routes to and from points on the Union Pacific in the northwest area and the Rio Grande via the Ogden gateway to and from Colorado common points, the Missouri River gateways and beyond."

Aside from the fact that no one can ascertain from the court's decision just what through routes, between what points or termini, or for what commodities, the court holds to be in existence via the Rio Grande, its loose and untenable treatment of this question is illustrated by the situation of the Great Northern, Northern Pacific and Milwaukee. Among the factors recited in the court's opinion and upon which it presumably relied are:

(1) That through routes and joint rates had been established via the Rio Grande during court receivership of the Union Pacific, Oregon Short Line and Oregon Washington Railroad and Navigation Company in 1897, and the joint rates but not the through routes were cancelled in 1906 and 1912. But, there is no showing on this record that the Great Northern, Northern Pacific or Milwaukee were parties to those old joint rates, and the Commission's report makes it clear that those old joint rates were established in connection with the Rio Grande by the Oregon Short Line and the Oregon Washington Railroad and Navigation Company—not by the Great Northern, Northern Pacific or Milwaukee (R. 67).

(2) That a few shipments moved west via the Rio Grande and the Union Pacific in 1948. But there is not a shred of evidence that a single one of those shipments moved to or from a point on either the Great Northern, the Northern Pacific or Milwaukee (original I. C. C. Ex. 1, pp. 4 and 5). That evidence shows that all of the westbound "bridge" shipments cited moved to points on the Union Pacific in Idaho, Washington, Utah and Montana and it further shows that the eastbound shipments, which were not "bridge traffic" involved here but local traffic for delivery at points on the Rio Grande, originated at points on the Union Pacific except one shipment from St.

Helens, Oregon, on the Spokane, Portland and Seattle railroad, one shipment from Trentwood, Washington, on the Spokane International Railroad, and one shipment from Port Angeles, Washington, on the Milwaukee Railroad. But, as stated, these were not shipments of "bridge" traffic and they have no bearing upon the question whether the Rio Grande had been used as a part of a route for such traffic.

(3) That eastbound joint rates on sheep and goats apply via the Rio Grande. But the Commission's report shows that these rates are from "Union Pacific origins in the excluded territory to Missouri River markets and points east thereof" (R. 85), and not from points on the Great Northern, Northern Pacific or Milwaukee.

Thus, at least three of the factors which the lower court apparently considered important in reaching its conclusion as to the existence of through routes via the Rio Grande are absent with respect to the Great Northern, Northern Pacific and Milwaukee. The court, nevertheless, makes no distinction or differentiation as to those lines, or any other of the numerous lines concerning which the record is completely devoid of evidential facts or elements of the sort recited by the court as justifying its conclusion that through routes via the Rio Grande were already in existence.

## IV.

Upon its holding that the Commission "erred as a matter of law" in Finding That There are at Present no Through Routes via the Rio Grande as Claimed by it, and That This Finding "obviously prejudiced the entire proceeding", the District Court Erred in Concluding That the Commission's Order Should be Annulled and set Aside Only "in so far as it denied relief to the Rio Grande", and in Failing to Hold That the Order Requiring Through Routes and Joint Rates for the Articles Therein Named, as Well as the Commission's Failure to Require Joint Rates for all Commodities Should be Annulled and set Aside.

The district court held:

"We are of the opinion that the finding of the Commission that there are at present no through routes over the Rio Grande via the Ogden gateway is not supported by substantial evidence. It is our view that the Commission erred as a matter of law in reaching the conclusion, upon a consideration of undisputed facts, that such through routes are not in existence. This erroneous, self-imposed restriction upon its authority to establish joint rates *obviously prejudiced the entire proceeding.*" (Italics added; R. 287-288.)

After reversing the Commission and making its own finding that through routes via the Rio Grande had been established, the court said the Rio Grande was entitled, as a matter of law, "to have the Commission apply the provisions of §§ 1(4), 3(4), 15(1), and 15(3) of the Act, free of any of the limitations imposed by § 15(4) with respect to establishing through routes" (R. 294).

The court refers to the Commission's finding that through routes via the Rio Grande do not exist as a "self imposed restriction upon its authority to establish

joint rates". The court seemed to think that but for its finding that through routes were not in existence via the Rio Grande the Commission would have made an order more favorable or entirely favorable to the Rio Grande by including all, instead of a part, of the traffic in its order. Such a view is clearly illogical and erroneous for the Commission's finding of the non-existence of through routes via the Rio Grande manifestly did not serve as a "restriction" or a deterrent to its giving the Rio Grande the benefit of through routes and joint rates on a third of the traffic.

A finding of "public interest" is essential to the prescription of joint rates, regardless of whether through routes already exist, and since the Commission unhesitatingly ordered through routes on all of the traffic for which it thought the evidence sufficient to prove that joint rates were necessary in the public interest, it results that it was not the "limitations imposed by § 15(4) with respect to establishing through routes", but an insufficiency of evidence of public interest in joint rates on traffic not included in the order that prevented the Commission from making an order more favorable to the Rio Grande.

The chief examiner in his proposed report also found, as did the Commission, that the through routes claimed by the Rio Grande were not in existence, but nevertheless proceeded to recommend that the Commission order through routes and joint rates on all commodities, because he thought the evidence proved necessity for them in the public interest. Thus, the short-haul limitation in Section 15(4) operated as no restriction whatever upon the chief examiner, nor upon the Commission to the extent that it thought the evidence proved that joint rates were necessary in the public interest.

While we submit that as shown above the Commission correctly found that no through routes presently exist as claimed by the Rio Grande, but even if it committed error of law in so finding, the error is irrelevant to the validity of the order and is of no consequence unless it is a "distinct and dominant proposition of law \* \* \* the exact influence of which, in its [the Commission's] decision, could be estimated", *Illinois Cent. &c. R. R. v. Inter. Com. Comm.*, 206 U. S. 441, 457. The lower court does not, and no one can demonstrate that the Commission's finding that through routes via the Rio Grande do not presently exist "prejudiced" or had any effect or influence upon its ultimate conclusions or its failure to grant the Rio Grande's full demands. That neither the proceeding before the Commission nor the Rio Grande was "prejudiced" by that finding is clearly demonstrated by the fact that the Rio Grande made no objection, exception or claim that the same finding made by the chief examiner influenced or prejudiced his conclusions and recommendation that the Commission require through routes and joint rates on all commodities.

However, if we are wrong, and if the court was correct in its view that the Commission's finding of the non-existence of through routes via the Rio Grande was an error of law which "prejudiced the entire proceeding", it is inescapable, we submit, that the *whole proceeding* before the Commission, including its order requiring through routes and joint rates for the articles therein named as well as its failure to require joint rates on still more or all commodities, was by that finding vitiated and completely nullified, and that the court patently errs in decreeing that the order will be annulled, set aside and remanded to the Commission *only* "in so far as it denied relief to the Rio Grande".

An error of law so fundamental and having such pervading consequential effect that it "obviously prejudiced the entire proceeding" necessarily nullifies *all* action flowing from such error of law, and the court plainly exceeds its power in attempting to save that part of the "prejudiced" proceeding which confers benefits upon the Rio Grande, while condemning the part of the same "prejudiced" proceeding which failed to benefit the Rio Grande. In other words, though holding that the *entire* proceeding was prejudiced, the court nullifies and would permit the Commission to reconsider only that part which fails to benefit the Rio Grande, while withholding from the Commission's reconsideration that part of the prejudiced proceeding which resulted in substantial financial gain to the Rio Grande.

The inevitable and unavoidable effect of the court's holding that the Commission's finding that through routes do not presently exist as claimed by the Rio Grande is an error of law which "obviously prejudiced the entire proceeding", like a blight which kills a tree and all of its roots and branches, is completely destructive and nullifying of all and not merely a part of the action flowing from the error. There can be no "unprejudiced" or lawful part of the action flowing from an error which "obviously prejudiced the entire proceeding". No case can be found in which such incongruous action has been undertaken by a court under such circumstances. Instead, the courts have invariably completely, and not partly, annulled and set aside orders held to have resulted from fundamental errors of law, or from the Commission's misinterpretation of its authority or from its arbitrary action. For example, in *Ann Arbor R. Co. v. United States*, 281 U. S. 658, this Court held that the Commission had committed error of law by misconstruing a Joint

Resolution of Congress in issuing the order there considered, but the Court did not undertake to save any part of the order. Instead, at page 669, it held:

“Our conclusion is that the order of the Commission was based upon an erroneous construction of the Joint Resolution, and therefore should have been set aside by the Court below”.

\*In *Atchison, etc. Ry. Co. v. U. S.*, 284 U. S. 248, the Commission had issued an order prescribing rates on grain and grain products throughout most of the United States. After the order was issued, several western railroads petitioned the Commission to reopen the proceedings and receive further evidence which would disclose drastically changed conditions resulting from the early effect of the great “Depression”, and the consequent inability of the railroads to withstand the rate reductions required by the order. The Commission denied the petition. This Court held that the Commission’s refusal of further hearings and reconsideration in the light of the facts which the petition offered to prove was an arbitrary denial of right. The court did not attempt to save any part of the order or to remand the case to the Commission. Instead, at page 263, the opinion concludes:

“The order of the District Court refusing an interlocutory injunction is reversed, and the cause is remanded with direction to grant the injunction as prayed”.

Even in cases where the courts have found that the Commission acted lawfully in granting a part of motor carrier operating rights but acted upon an error of law or misinterpretation of the Act in denying other parts of the rights sought by the applicant, the courts, upon holding that the Commission’s denial of a part of the rights sought resulted from its error of law, have not

tried to save the rights lawfully granted but have annulled and set aside the entire order. Such a case is *Carolina Freight Carriers Corp. v. United States*, 38 F. Supp. 549, in which the district court, though "remanding" the case to the Commission, said at page 556:

"For the reasons stated the order of the Commission will be set aside."

The ~~decree~~ of the district court was affirmed by this Court without suggesting that the order be annulled and set aside only insofar as it refused operating rights as a result of its error of law. *U. S. v. Carolina Carriers Corp.*, 315 U. S. 475, 490.

In *E. Brooke Matlack, Inc. v. United States*, 119 F. Supp. 617, the Commission issued an order granting a part and denying a part of the operating rights sought by the motor carrier's application. The court held that the denial of part of the rights was the result of erroneous and unlawful action by the Commission, but it decreed that the Commission's whole order be set aside, without suggesting that the rights lawfully granted by the order be withheld from reconsideration by the Commission.

For the foregoing reasons, the lower court, upon its holding that the "entire proceeding" was prejudiced by the Commission's finding that no through routes presently exist as claimed by the Rio Grande, could only decree that the entire order be annulled and set aside, for it has no power to save that part of the Commission's "prejudiced" action which is beneficial to the Rio Grande while annulling and setting aside the part of the same "prejudiced" action which is unfavorable to the Rio Grande.

## V.

The District Court Erred in Commingling and Confusing the Provisions of Sections 1(4), 3(4), 15(1) and 15(3) of the Act and in Ignoring the Fact That the Commission had Already Heard and Adjudicated the Rio Grande's Case.

The district court so wrote its opinion as to make it impossible to follow its reasoning, but it is clear that the court thought the Rio Grande was entitled to a more favorable order than had been given it by the Commission, and sought to remand the case to the Commission in such way as to accomplish that result. In doing so the court has confused and commingled separate and independent provisions of the Act and refused to review the Commission's action upon the record made before the Commission and introduced in the court.

The opinion says:

"If the Rio Grande, in the proceeding before the Commission, established its right to the relief prayed for, it was entitled to an order establishing just and reasonable and non-discriminatory through rates and equitable divisions thereof, and a removal of the discrimination resulting from the existing through rates, which were a combination of intermediate or local rates \* \* \*." (R. 294)

The opinion then states that the Rio Grande was entitled "as a matter of law, to have the Commission find that such through routes had been established" and in passing on the allegations of its complaint "to have the Commission apply the provisions of §§ 1(4), 3(4), 15(1) and 15(3) of the Act, free of any of the limitations imposed by § 15(4) with respect to establishing through routes" (R. 294). The opinion then says:

"If the Rio Grande, on its showing before the Commission and an application of the provisions of §§ 1(4), 3(4), 15(1) and 15(3), was entitled to an order requiring the establishment and maintenance of such joint rates for the through routes which we hold had been established, then necessarily the denial of the order prayed for deprived the Rio Grande of a pecuniary gain to which it was entitled." (R. 294) /

The first difficulty with the court's theorizing with respect to what the Rio Grande might have been entitled to receive under various "if" propositions is that it ignores the fact that the Commission fully heard and thoroughly adjudicated the Rio Grande's complaint and its allegations of violations of each of the provisions mentioned by the court. The second difficulty with the court's treatment of the case is its apparent assumption that the Commission necessarily would have given the Rio Grande a more favorable order if it had dealt with the case "free of any of the limitations imposed by § 15(4) with respect to establishing through routes", the error of which assumption we have already demonstrated.

The admitted and undeniable purpose of the Rio Grande's complaint to the Commission was to short haul Union Pacific routes and divert their traffic to its line in the hope of improving its own financial position. The crux of its complaint was that, although the traffic could move over its line at present combination rates, those rates were so much higher than rates via Union Pacific routes, it could not persuade shippers to short haul Union Pacific routes by diverting the traffic to its line. To accomplish the short-hauling purpose it demanded joint rates exactly equal to those maintained by Union Pacific

routes. In other words, it was solely because of the higher rates via its line that the Rio Grande could not succeed in its purpose to divert traffic from Union Pacific routes. This was clearly recognized by the Commission in its statement that "[t]he higher rates and charges act as deterrents to shippers and, in effect, close the Ogden gateway in a commercial sense", and that it was asked by the Rio Grande "to exercise our authority under Section 15(3) of the Act by requiring the establishment of joint rates through that gateway upon findings that such rates are necessary or desirable in the public interest" (R. 60-61).

Obviously, since the traffic could move via that route if shippers were willing to pay the higher combination rates, the "establishment" of through routes without equal rates via the Rio Grande was a futility. In short, through routes via the Rio Grande with rates any higher than those maintained over Union Pacific routes were useless because only with equal rates could the Rio Grande succeed in its purpose to divert the traffic to its line. Clearly, the obstacle in the Rio Grande's path to its realization of additional pecuniary profit by diverting traffic from Union Pacific routes was its higher rates and not that the traffic could not physically move over its line.

The language quoted above from the court's opinion indicates the view that if the Commission had found that through routes already existed via the Rio Grande it would have made findings under Sections 1(4), 3(4), 15(1) and 15(3) more favorable to the Rio Grande than the findings it made. But the Commission found the combination rates unreasonable and unduly prejudicial to the extent they exceeded the joint rates of Union Pacific routes; found that upon the evidence no discrimination

was being practiced by other carriers against the Rio Grande; and ordered establishment of joint rates which it found necessary in the public interest for the specified commodities via the Rio Grande "the same" as rates over Union Pacific routes.

Thus, the court falsely assumed that but for its holding that through routes did not exist via the Rio Grande the Commission would have made findings more favorable or that would necessarily have given the Rio Grande equal joint rates it demanded on all of the traffic, for, it was not a failure or refusal by the Commission to make the findings demanded by the Rio Grande or the nature of the findings made, but the insufficiency of the evidence, which was the Commission's exclusive duty to evaluate, to prove that public interest required through routes and joint rates on more commodities that limited the Rio Grande's benefits to those named in the order. There is no room for assuming that the Commission would have ordered rates on additional commodities if it had felt free of the limitations of Section 15(4), for it still was limited by the "public interest" standard of Section 15(3), and, applying that standard, it has given the Rio Grande all it thought the evidence justified.

The district court apparently did not understand that short-hauling Union Pacific routes by establishment of equal rates with the Rio Grande is clearly forbidden unless that is "necessary or desirable in the public interest", regardless of whether through routes, physically exist via that line over which the traffic can be moved at higher rates, *Thompson case, supra*.

It is the equalization of rates and not the existence of through routes that would enable the Rio Grande to

divert the traffic and short haul Union Pacific routes. Therefore, since the purpose of the Act is to forbid short-hauling existing routes, it necessarily results that the very root of the short-haul prohibition is equalization of rates that divert traffic from existing routes, and not the mere establishment of a "through route". Indeed, if this were not true the Rio Grande would not have complained, for obviously it would have no motive or purpose in complaining if it had been able to divert to its line all the traffic it wanted at the higher combination rates which, of course, would give it more revenue than a division of the lower joint rates.

Realistically, and from a practical standpoint, what the short-haul prohibition actually forbids is the ordering of joint rates that would enable the Rio Grande to divert traffic to its line from Union Pacific routes, for, as illustrated by this case, it is unequal rates that prevent short-hauling and equal rates that permit it.

The district court's inept lumping of Sections 1(4), 3(4), 15(1) and 15(3), and its statement that the Commission should have applied those provisions without reference to the limitations in Section 15(4) leaves its opinion confusing and incomprehensible as usually is the case when separate and independent provisions of an act are commingled and their separate and different purposes are disregarded. If, as indicated by its opinion, the court thought that the Rio Grande would have been entitled to the joint rates it demanded if the Commission had applied Sections 1(4), 3(4) and 15(1) "free of the limitations" in Section 15(4), then the court clearly errs, first, in assuming that, so applying the provisions of those three sections, the Commission had power to order joint rates and, second, in ignoring the fact that the Commission plainly did not apply those provisions subject to

the short-haul limitations in Section 15(4), but as clearly shown in its report (R. 65), it proceeded upon the correct view that an order requiring the joint rates demanded by the Rio Grande must be grounded upon findings in Section 15(3) as limited by Section 15(4).

The power to deal with reasonableness of rates and discrimination under Sections 1(4) and 3(4) is separate and distinct from the power to require joint rates, which can be exercised only upon a finding of public interest. That finding is not a prerequisite to exercise of the power under Section 15(1) to prescribe reasonable and non-discriminatory rates. While the power to require joint rates in lieu of combination rates may, upon a valid finding that joint rates are necessary "in the public interest", be exercised separately from the power to require through routes where through routes already exist, and requiring the same joint rates over the same through route would not divert traffic from other routes, but the joint rate power clearly may not be exercised separately from the limitations upon it where, as here, the very purpose is to divert traffic to the Rio Grande from Union Pacific routes, or for the purpose of curing violations of Section 1(4) or Section 3(4), *U. S. v. Great Northern R. Co.*, 343 U. S. 562.

## -VI-

**The District Court Exceeded its Power by Usurping Administrative Authority to Make Findings of Fact Favorable to the Rio Grande and Thereupon "remanding" That Part of the Case "with appropriate instructions" to the Commission "for further proceedings in conformity with this opinion".**

The court's opinion reflects a strong tendency to control the exercise of the Commission's exclusive adminis-

trative power in its "further proceedings" pursuant to the court's "remand" of *only* that part of the case which is unfavorable to the Rio Grande. The court even goes so far as to make its own administrative findings of fact. For example, the opinion finds:

"Here, the Rio Grande sought an order compelling the defendant railroads to perform their statutory duty to establish just and reasonable joint rates, fares, and charges over through routes, and if it was entitled to such an order, then it was immediately and directly affected and *suffered discrimination* by the refusal of the Commission to direct the defendant railroads to comply with the statutory mandate." (R. 297)

\* \* \* \* \*

"Here, under the facts alleged and the proof before the Commission, the continuance of existing rates and charges over the through routes results in discrimination adversely affecting the Rio Grande and shippers over its lines." (R. 297)

\* \* \* \* \*

"Here, the very thing the Rio Grande seeks is not a mere competitive advantage, but the establishment of just and reasonable through rates and the removal of unjust discrimination, which will result in pecuniary profit to the Rio Grande and the deprivation of which would prevent the Rio Grande from enjoying increased traffic and increased earnings." (R. 299)

These are plain findings of fact and in making them the court ignores the settled rule laid down in the Court's decisions that in reviewing orders of the Commission the courts may not "usurp merely administrative functions", *Interstate Comm. Comm. v. Ill. Cent. R. R.*, 215 U. S. 452, 470. Having usurped administrative authority to make these findings, the lower court then would further exceed its powers and make its findings binding

upon the Commission by "remanding" the case to the Commission "for further proceedings in conformity with this opinion". If the "remand" were within the court's power, which we think it is not, the Commission in such "further proceedings" would be bound to adopt the administrative findings of fact which the court has made even though they would compel a decision completely favorable to the Rio Grande and are contrary to the Commission's own findings already made in its report.

Fortunately, the Commission's exclusive administrative discretion may not be so easily pre-empted or controlled, for the court has no authority to make administrative findings of fact and it has no power to "remand" a case to the Commission with direction to proceed further in conformity with the court's unauthorized administrative findings of fact.

The statute (28 U. S. Code, Sec. 1336) authorizing review of the Commission's orders gives the courts no power to "remand" a case to the Commission. Under the specific language of the statute, the courts are given power only to "enjoin, set aside, annul or suspend in whole or in part, any order" of the Commission. In view of the exact statutory specification and limitation of what the courts may do upon reviewing an order of the Commission, and the failure of Congress to empower the courts to "remand" cases to that legislative and administrative agency, there is no express power in the courts to "remand" cases to the Commission.

An appropriate federal court has power to compel the Commission to act only in a mandamus suit, but this is not such a suit, and no court in any type of proceeding has power to compel the Commission to decide a case as a court might think it should be decided.

The district court said that this Court's decision in *Sec'y of Agriculture v. United States*, 347 U. S. 645, is its authority "to enter an order remanding the case to the Commission with appropriate instructions" (R. 293). But, regardless of whether the courts have power to remand cases to the Commission in the sense that it remands them to lower courts, this Court did not remand the *Agriculture* case "with appropriate instructions" nor upon findings of fact made by this Court, but merely "for further proceedings not inconsistent with this opinion", and the opinion at pages 653-655 clearly shows that the purpose of the "remand" was not for the Commission to conform its own decision to findings of fact or other suggestions made by the Court but to give the Commission a chance to make its decision understandable to the Court by explaining "its departure from prior norms" and spelling out "the legal basis of its decision", and to "make more explicit findings as to the differences and similarities in the treatment accorded other commodities unloaded at these same points." Certainly there is no manifestation in such a "remand" to control the Commission's administrative judgment as there clearly is in the instant case.

In *Manufacturers Ry. Co. v. United States*, 246 U. S. 457, this Court held at page 483 that jurisdiction to review orders of the Commission "does not permit the court to exercise administrative authority where the Commission has failed or refused to exercise it". And in *Standard Oil Co. v. United States*, 283 U. S. 235, at page 241, it is held that the courts are without jurisdiction to aid a plaintiff to obtain indirectly through a court decision "the same relief it failed to secure from the Commission". This Court said in *Ford Motor Co. v. Labor*

*Board*, 305 U. S. 364, at page 373, that in exercising the power to review an administrative order—

“\* \* \* the court must act within the bounds of the statute and without intruding upon the administrative province.”

Contrary to this Court's principles, the decision below would effect a “substitution of judicial for administrative discretion”, *Communications Comm'n v. WOKO*, 329 U. S. 223, 229, and destroy the “wide discretion” and “wide latitude” which Congress has delegated to the Commission, *Siegel Co. v. Trade Comm'n*, 327 U. S. 608, 611-613. The decision below is at war with the holding of this Court in *Radio Comm'n v. Nelson Bros. Co.*, 289 U. S. 266, 276, that it is not within the province of a court “to revise the Commission's decision and to enter such judgment as the court may think just.”

The usurpation by the lower court of administrative authority to make important and controlling findings of fact and remanding the case for further proceedings in conformity with those findings and the views expressed in the court's opinion not only nullifies the Commission's independent administrative functions but also contravenes the fundamental division of authority between administrative commissions and the courts. The court's action must be rejected because it runs afoul this Court's pronouncement in *Humphrey's Executor v. U. S.*, 295 U. S. 602, 629, that:

“The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question”.

# CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded to it with direction to dismiss the complaint.

Respectfully submitted,

ELMER B. COLLINS,  
*Counsel of Record,*  
1416 Dodge Street,  
Omaha, Nebraska.

F. O. STEADRY,  
L. E. TORINUS,  
WARREN H. PLOEGER,  
ROLAND J. LEHMAN,  
EUGENE S. DAVIS,  
JAMES C. WILSON,  
*Attorneys for Appellants.*

W. R. ROUSE,  
LOWELL HASTINGS,  
EDWIN C. MATTHIAS,  
M. L. COUNTRYMAN, JR.,  
J. C. GIBSON,  
*Of Counsel.*

## PROOF OF SERVICE

I, ELMER B. COLLINS, counsel of record for appellants herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 15th day of March, 1956, I served, on behalf of all Appellants herein, copies of the foregoing brief on the several adverse parties in Nos. 117, 118, 119, 332, 333, and 334, as follows:

1. On the United States of America by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Honorable Simon E. Sobeloff  
Solicitor General of the United States  
Department of Justice  
Washington 25, D. C.

Stanley N. Barnes, Esq.  
Assistant Attorney General  
Department of Justice  
Washington 25, D. C.

Donald E. Kelley, Esq.  
United States Attorney  
Post Office Building  
Denver 1, Colorado

and with first-class postage prepaid to:

Donald R. Ross, Esq.  
United States Attorney  
306 Post Office Building  
Omaha, Nebraska

2. On the Interstate Commerce Commission by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Samuel R. Howell, Esq.  
Assistant General Counsel  
Interstate Commerce Commission  
Washington 25, D. C.

3. On the United States Department of Agriculture by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Neil Brooks, Esq.  
Assistant General Counsel  
United States Department of Agriculture  
Washington 25, D. C.

4. On The Denver and Rio Grande Western Railroad Company by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Robert E. Quirk, Esq.  
1116 Investment Building  
Washington 5, D. C.

Dennis McCarthy, Esq.  
Walker Bank Building  
Salt Lake City 1, Utah

Frank E. Holman, Esq.  
1006 Hoge Building  
Seattle 4, Washington

Ernest Porter, Esq.  
603 Rio Grande Building  
Denver 2, Colorado

and with first-class postage prepaid to:

Harry L. Welch, Esq.  
730 Farm Credit Building  
206 South 19th Street  
Omaha 2, Nebraska

5. On Idaho Farm Bureau; Public Service Commission of Utah; Committees of Railroad Brotherhoods who work for The Denver and Rio Grande Western R. R. Co.; National Live Stock Producers Association; Pueblo Chamber of Commerce; Arkansas Valley Stock Feeders Association; Colorado Wool Growers Association; Western Forest Industries Association; Koppers Company,

Inc.; Utah Growers Cooperative, Inc.; Knudsen Builders Supply Company, Inc.; and Structural Steel and Forging Company, by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Barry & Hupp  
738 Majestic Building  
Denver 2, Colorado

Lee J. Quasey, Esq.  
139 N. Clark Street  
Chicago 2, Illinois

Alden T. Hill, Esq.  
Woolworth Building  
Fort Collins, Colorado

and with first-class postage prepaid to:

Ray McGrath, Esq.  
First National Bank Building  
Omaha, Nebraska

6. On The Public Utilities Commission of Colorado by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

William T. Secor, Esq.  
Asst. Attorney General  
State of Colorado  
Denver, Colorado

7. On Holly Sugar Corporation by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

Löwe P. Siddons, Esq.  
Dennis O'Rourke, Esq.  
Attorneys for Holly Sugar Corporation  
Holly Sugar Building  
Colorado Springs, Colorado

8. On The American Short Line Railroad Association by mailing a copy in a duly addressed envelope with air mail postage prepaid to:

W. J. Hickey, Esq.  
Vice President and General Counsel  
The American Short Line Railroad Association  
2000 Massachusetts Avenue, N. W.  
Washington 6, D. C.

ELMER B. COLLINS,  
*Counsel of Record for*  
*Appellants Herein,*  
1416 Dodge Street,  
Omaha, Nebraska.



*The Pertinent Provisions of the Interstate Commerce Act (United States Code, Title 49), Involved in this Case are as Follows:*

#### National Transportation Policy—

“It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service, and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several states and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.”

#### Section 1(4)—

“It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to

part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Section 3(4)—

"All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term 'connecting line' means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III."

Section 15(1)—

"That whenever, after full hearing, upon a complaint made as provided in section 13 of this part, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers sub-

ject to this part for the transportation of persons or property as defined in the first section of this part, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this part, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this part, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

Section 15(3)—

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classification, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and mini-

## Appendix B

ma, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. \* \* \*

## Section 15(4)—

“In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and point rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.”

## Section 15(8)—

“In all cases where at the time of delivery of property to any railroad corporation being a common carrier, for transportation subject to the provisions of this part to any point of destination, between which and the point of such delivery for shipment two or more through routes and through rates shall have been established as in this part provided to which through routes and through rates such carrier is a party, the person, firm, or corporation making such shipment, subject to such reasonable exceptions and regulations as the Interstate Commerce Commission shall from time to time prescribe, shall have the right to designate in writing by which of such through routes such property shall be transported to destination, and it shall thereupon be the duty of the initial carrier to route said property and issue a through bill of lading therefor as so directed, and to transport said property over its own line or lines and deliver the same to a connecting line or lines according to such through route, and it shall be the duty of each of said connecting carriers to receive said property and transport it over the said line or lines and deliver the same to the next succeeding carrier or consignee according to the routing instructions in said bill of lading: *Provided, however,* That the shipper shall in all instances have the right to determine, where competing lines of railroad constitute portions of a through line or route, over which of said competing lines so constituting a portion of said through line or route his freight shall be transported.”

## Section 20(11)—(in part)

“That any common carrier, railroad, or transportation company subject to the provisions of this part receiving property for transportation from a point in one State or Territory or the District of Columbia to a point in another State, Territory, Dis-

trict of Columbia, or from any point in the United States to a point in an adjacent foreign country shall issue a receipt or bill of lading therefor, and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass within the United States or within an adjacent foreign country when transported on a through bill of lading, and no contract, receipt, rule, regulation, or other limitation of any character whatsoever shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed;

\* \* \*